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87-1007

No. 87—

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1987

JAMES M. PICOZZI,

Petitioner,

against

TERRANCE SANDALOW,
individually and in his official capacity as
Dean of the University of Michigan Law School,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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November, 1987

QUESTIONS PRESENTED

1. May the dean of a public law school suspend a student for an indefinite period, on disciplinary grounds, without ever charging the student with an offense, identifying any evidence against the student, or specifying the nature of any hearing to be offered to the student?

2. Whether the dean of a public law school may give a student, facing permanent expulsion, a choice only between inadequate procedure or waiving his protected interest in his education -- or whether the dean withholds

constitutionally adequate procedure at his own peril?

3. Where a student suspended from a public law school receives due process only by bringing a suit under 42 U.S.C. § 1983, and where the procedures won lead to his exoneration, is the student a "prevailing party" entitled to attorney's fees under 42 U.S.C. § 1988?

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Opinions Below

The opinion of the Court of Appeals (App. 48) is reported at 827 F.2d 770 (6th Cir. 1987). The District Court's opinion is reported at 623 F.Supp. 1571 (E.D. Mich. 1986). (App 1.)

Jurisdiction

The judgment of the Court of Appeals was entered on August 28, 1987. (App. 48). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

1. The Due Process Clause of the Fourteenth Amendment provides the following:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,
>
> liberty or property, without due process of law . . .

U.S. Const. Amend. XIV, § 1.

2. 42 U.S.C. § 1983 provides the following:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. 42 U.S.C. § 1988 provides the following:

> In any action or proceeding to enforce a provision of [section] . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT

This Petition arises from a civil action brought under 42 U.S.C. § 1983 by Petitioner James M. Picozzi ("Picozzi") against Respondent Terrance Sandalow ("Sandalow"), both individually and in his official capacity as Dean of the University of Michigan Law School. It maintains that, subsequent to a fire in the University of Michigan ("U-M") Law School dormitory on March 8, 1983, Sandalow suspended Picozzi without even minimal due process under the 14th Amendment. Specifically, having suspended Picozzi, Sandalow did not then move ahead to charge Picozzi with an offense, identify any evidence purporting to inculpate Picozzi, or specify what procedure was available to Picozzi. When a two-week Disciplinary Hearing was finally held two years after

the fire, in February and March of 1985, Picozzi was exonerated from any wrongdoing. The facts surrounding the fire, as recited below, are as established at the Disciplinary Hearing.

In the spring of 1983, Picozzi was a second-year student at the U-M Law School, who had, by all accounts, adopted a low profile. Indeed, the Hearing Officer's opinion from the Disciplinary Hearing highlights that Picozzi was "behaving normally." In contrast, the Hearing Officer observed that other students at the Law School "were engaged in very immature conduct."

In late January 1983, a law student named Thomas Good started a rumor that Picozzi had a handgun, which he kept in

his dormitory room.[1] That rumor was picked up by a second student, Ned Miltonberg, who lodged a complaint about the gun with Susan Eklund, Assistant Dean of the U-M Law School. Thomas Good subsequently filed a similar complaint.

On February 4, 1983, law dorm Director Diane Nafranowicz summoned Picozzi to her office and stated that she had received complaints about the alleged gun. In order to coax Picozzi into giving permission for a search of his room by U-M security officers, Nafranowicz not only fabricated a story about the source of her information, but also threatened that the room would be searched even absent consent. Picozzi,

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1. The Hearing Officer also specifically stated he did not believe Picozzi had a handgun in his room.

however, consented without hesitation. A search was conducted by Nafranowicz and a U-M security officer, but they discovered neither a gun nor other contraband.

Picozzi later approached Assistant Dean Eklund, seeking both an explanation for the search and guidance as to the proper channels for registering his own complaint about what had occurred. Eklund denied knowing either the source of the complaints or who had ordered the room search. Additionally, she attempted to discourage Picozzi from pursuing the matter further. Despite her representations to Picozzi, however, it was later established that Eklund had not only ordered the search, she had also instructed Nafranowicz to hide Eklund's role in the matter from Picozzi. Sandalow refused to see Picozzi about the matter.

Ten days after the search, on February 14, 1983, Picozzi entered the law school to find dozens of posters placed all over the walls, depicting his head superimposed upon the body of a cherub carrying a machine gun, and proclaiming "A FIST FULL OF FIREPOWER." When Picozzi approached Eklund, she denied knowing the source of the posters. Moreover, Eklund insisted that it would be impossible to determine who had in fact created the posters -- despite the fact several dozen had been hung on the law school walls. At Picozzi's Disciplinary Hearing two years later, it was easily established that Thomas Good and another law student, David Berger,[2] had hung the posters.

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2. Berger was a close friend of both Good and Miltonberg, and had been present when the gun rumor had first been generated.

At approximately 4:10 a.m. on March 8, 1983, unknown persons opened the door to Picozzi's room in the U-M law dormitory, splashed in a quantity of gasoline and ignited it. As the resulting inferno blocked the door, Picozzi was only able to escape the room through a window. He first balanced on the sill for almost 12 minutes while calling for help, but finally lost his balance and fell some 40 feet to the ground.[1] Curiously, within two hours

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3. Picozzi was burned over 12% - 15% of his body exterior, as well as having his throat seared by the hot air. Additionally, the toxic smoke and soot inhaled by Picozzi required that he be placed on oxygen for several weeks and undergo painful respiratory therapy. The fall shattered Picozzi's spine, leaving his lumbar III vertebra in three distinct pieces. Additionally, the impact tore all of the ligaments in the lumbar region of his back and caused severe nerve trauma, leaving

Footnote Continued

of the fire, the Ann Arbor police decided to investigate only Picozzi, the victim of the fire, rather than other, more obvious, suspects.[4]

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3. Footnote Continued From Previous Page

Picozzi's bladder and bowels paralyzed for a short time. Picozzi ultimately required surgery, where a piece of his left hip was grafted onto his spine and, additionally, two steel rods were placed in his back. Picozzi was encased in a full body cast from April 1983 until October 1983.

4. When Miltonberg arrived for class at the law quad on the morning of March 8 and allegedly learned of the fire for the first time, he immediately went to Assistant Dean Eklund to assure her that he had not set it because, as he later stated, he knew he would be a suspect. Yet, notwithstanding his concern with his possible status as a suspect, when questioned about his whereabouts by the police just days later, Miltonberg said he could not remember where he was in the hours preceding the fire.

Just two hours prior to the fire, Berger and Good were out drinking

Footnote Continued

The investigation conducted by the Ann Arbor police consisted primarily of

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4. Footnote Continued From Previous Page

with yet another student who had passed rumors about Picozzi, Katherine Rutkowski. Good, who originally stated that he was sleeping so soundly when the alarm went off that his roommate had to shake him awake, later admitted he frequently pretended to be asleep. A student who later saw him in the courtyard testified that, from a distance of several yards, Good shook visibly and refused to walk around to the other side of the building to see what had happened to Picozzi. Rutkowski insisted she had slept through the fire and dormitory alarm, yet testimony at the Disciplinary Hearing revealed that other students had knocked on her door during the fire and received no response.

At the Disciplinary Hearing, Detective David Jachalke, who supervised the investigation, testified that the only investigation of Miltonberg, Berger and Good was to ask them where they were at the time of the fire. No corroboration was sought. Rutkowski was not even questioned.

interviewing other U-M law students, informing the students of their belief that Picozzi had set the fire, and then harvesting the rumors which their own statements inevitably caused. Additionally, police officers visited Picozzi on several occasions in the intensive care ward of the U-M hospital where Supervising Detectives Jachalke and Atkinson attempted to induce Picozzi to convess by stating, *inter alia*, that they had "absolute proof" of Picozzi's guilt and that they would not rest until he was behind bars.[5]

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5. At the Disciplinary Hearing two years later, Sandalow's counsel argued that the hospital cardiac monitor attached to Picozzi during these sessions acted as a crude polygraph. Sandalow's counsel argued that the quickening of Picozzi's heartbeat while Jachalke and Atkinson accused him of a felony was evidence of Picozzi's guilt.

Due to a lack of evidence, on March 31, 1983 the Washtenaw County Prosecutor officially declined the request by the Ann Arbor police to prosecute Picozzi. On that date, Detective Jachalke not only relayed the Prosecutor's decision to Sandalow but also, as Sandalow has sworn, "detailed" all the evidence collected by the police investigation. In other words, on March 31, 1983, the police informed Sandalow there was no credible evidence against Picozzi -- and, in fact, that they were marking the case "inactive." At that time, Sandalow neither pursued the investigation on his own nor charged Picozzi with any offense. [6]

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6. Around this time, life at the U-M Law School had become undeniably dangerous. In the month of March alone, the following unrelated

Footnote Continued

Furthermore, during the entire month following the fire, neither Sandalow nor any other law school official even attempted to contact Picozzi.

Instead, on April 1, 1983, two letters were hand delivered to Picozzi in the U-M hospital. In one letter,

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6. Footnote Continued From Previous Page

events transpired: 1) Picozzi's room was set on fire; 2) one law student jumped and beat a second so severely that the second student required hospitalization; 3) a law student terrorized a law professor to the point where, allegedly, police protection was sought; 4) the number of obscene, threatening, and even death threatening phone calls to law students reached epidemic proportions.

On April 4, 1983 Sandalow responded to these disturbing incidents by writing a memo to the Law School community. In the memo, he characterized the occurrence of so many deviant acts in so short a period as nothing more than a "fortuitous circumstance."

Assistant Dean Eklund informed Picozzi's father, that she had received the father's request for a tuition refund. Eklund further stated that she was, in fact, refunding the tuition and, consequently, disenrolling Picozzi. In the second letter, Diane Nafranowicz informed Petitioner Picozzi that as he was no longer a student at the U-M law school, the lease for his dormitory room was being cancelled and he had already been locked out of the room.

In fact, Picozzi's father had never requested a tuition refund. Immediate phone calls by Picozzi's father to Eklund and Nafranowicz to deny the making of such a request met with no results. Phone calls to Sandalow and U-M President Harold Shapiro would not be received. Registered letters to Eklund and Nafranowicz, from both

Picozzi's father and Picozzi himself, stating that no request for tuition refund had ever been made, were never answered. Moreover, the alleged tuition refund which "necessitated" both the disenrollment and the lock-out never occurred. To this day, the University of Michigan continues to hold Picozzi's money.

During the second week of May 1983, while still awaiting an answer to the registered letters, Picozzi began to seek legal counsel from his convalescent bed. On May 11 or 12, 1983, he contacted Vincent Barker, a private practitioner in Toledo, Ohio and sometime lecturer at the U-M Law School, and asked him to recommend a lawyer who would be willing to bring suit against U-M on Picozzi's behalf. Barker declined to provide such a

recommendation, however, stating that due to his affiliation with the U-M law school, it might be construed as a conflict of interest.

By letter dated May 13, 1983, Sandalow contacted Picozzi for the very first time since the March 8 fire.[7] (App. 50.) He began his letter by stating he had spoken to Vincent Barker. Next, despite his explicit knowledge that the investigation had been concluded some six weeks before, Sandalow implied that a police investigation was ongoing and urged Picozzi to cooperate by submitting to a polygraph examination administered by the police. Further, he informed

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7. The District Court held this letter to be constitutionally adequate notice. (App. 33; 623 F. Supp. at 1580.)

Picozzi that, unless he submitted to the polygraph examination, an "administrative proceeding" would be required before Picozzi would be permitted to re-enroll. Significantly, Sandalow made no charge against Picozzi, identified no evidence purporting to inculpate him, and failed to inform Picozzi of the rules or nature of the "administrative proceeding."[8] Indeed, Sandalow has

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8. The U-M Law School Student Handbook contained detailed Rules on charging and adjudicating acts of student misconduct. The Rules provided for detailed notice, including a specific charge, explanation of the procedures, the student's rights and, ultimately, notice of the evidence discovered by a member of the faculty specially designated to investigate. The Law School Court provided a right to cross-examine or depose, a right to counsel, a right to remain silent, a right to an open hearing, and a burden on the Law School to prove its charge by a standard of clear and convincing evidence. Comparing Sandalow's

Footnote Continued

explicitly maintained that he neither intended the letter to be constitutional notice nor ever gave Picozzi constitutional notice, because he "never accused" Picozzi of anything at any time.

Picozzi immediately sought legal counsel in order to respond properly to Sandalow's letter. Notwithstanding physical and financial constraints, in late May 1983, Picozzi succeeded in retaining Detroit attorney Richard M. Goodman to represent him. During the following summer, Picozzi waited for Goodman either to respond directly to Sandalow or advise Picozzi how to

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8. Footnote Continued From Previous Page

letter to the Handbook Rules, it was clear to Picozzi that he was neither being charged under the Rules, nor was the "administrative hearing" to which Sandalow referred the one provided for by the Rules.

respond properly to Sandalow. When Goodman failed to take any action by October 1983, Picozzi discharged him.

In October 1983, Picozzi also contacted James Thomas, Dean of Admissions and Student Affairs at the Yale Law School, to explore the possibility of transfer. Thomas urged Picozzi to determine his precise status at the University of Michigan and to acquire a "letter of good standing,"[9] without which no law school would consider Picozzi's transfer application on its merits.

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9. A letter of good standing is a paper representation of a student's protected interest, i.e., it states that he is free to continue at his institution. The issuance of such a letter to a student who has not been suspended or expelled is a ministerial act, analagous to providing a student with a copy of his transcript. See infra note 19.

Picozzi made inquiries to Sandalow regarding his status and requested a letter of good standing. In response, Sandalow stated that Picozzi was "on a leave of absence from the law school, having withdrawn while in good academic standing." Yet, he refused to furnish the requisite letter of good standing. Moreover, Sandalow still failed to charge Picozzi with an offense or to state if there was any inculpatory evidence or information. As is now abundantly clear, the Ann Arbor police had no incriminating evidence against Picozzi and Sandalow knew it.

Unable to obtain a letter of good standing, Picozzi turned, in the first half of 1984, to investigating the matter himself. This included not only collecting more evidence, but acquiring the supposedly incriminating police

report.[10] During this period, Detective Jachalke admitted to Picozzi that the case had been marked inactive on March 31, 1983, that no charges were being contemplated against Picozzi, that the case was considered over, and that Sandalow had been informed of all these facts. Additionally Picozzi sought an attorney willing to represent him.

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10. Due to the unwillingness of the Ann Arbor police and fire departments to provide Picozzi with copies of their records relating to the fire, Picozzi was only able to obtain the relevant records through the efforts of a Detroit law firm, at which a friend worked. After obtaining the records, the firm refused to represent Picozzi in any further action because it was not prepared to be placed in an adversary position to the University of Michigan. Subsequently, more than a dozen Midwestern attorneys and law firms refused to represent Picozzi for similar reasons.

Finally, in July 1984, Picozzi induced the law offices of William Kunstler to take his case. Kunstler exchanged letters with several U-M officials -- including University President Harold Shapiro, University General Counsel Roderick Daane, and Sandalow himself -- but the University refused to issue the letter of good standing. Still, Sandalow neither charged Picozzi with any infraction nor disclosed if there was any evidence against him. Thus, in August 1984, Kunstler's office brought a lawsuit on Picozzi's behalf seeking compensatory and punitive damages, attorney's fees, and an injunction to provide Picozzi with a letter of good standing, so that he could resume his studies pending resolution of the controversy.

The case first came before the Honorable Charles Joiner, Federal District Judge in the Eastern District of Michigan and former Acting Dean of the U-M law school. Judge Joiner recused himself and the case was assigned to another U-M law alumnus, the Honorable John Feikens.

On August 30 and 31, 1984, Judge Feikens held a hearing to show cause why an injunction should not issue. The transcript of that hearing reveals that Picozzi was always prepared to submit to a Disciplinary Hearing with the procedures published in the Law School Handbook (App. 56-60.) Sandalow's attorney, Peter Davis, continually refused to hold such a hearing. (App. 54, 60.) Obviously, Sandalow had intended to provide Picozzi with much less process than was due him under the

law school rules (App. 54-55.) Indeed, when Davis was finally challenged by Judge Feikens to specify the precise procedure being offered by Sandalow to Picozzi, Davis requested an adjournment because he did not know (App. 61.)

Ultimately, under Judge Feikens' in-court supervision, the parties agreed upon procedures to be followed in a Disciplinary Hearing. Specifically, the procedures would now include (1) notice of a charge and evidence, (2) the Law School having to prove its case by a clear and convincing evidence standard, (3) an impartial hearing officer, (4) a right to cross-examination, (5) a right to counsel, and (6) the right to an open hearing.

Even though it had been 18 months since his suspension, Sandalow continued

to delay.[11] The Disciplinary Hearing did not finally commence until February, 1985.

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11. First, Sandalow's counsel incorrectly insisted that the agreement at the Injunction Hearing had been that the Hearing Officer would be a retired Michigan judge. Second, Sandalow's counsel continually rejected suggested Hearing Officers, insisting that the Hearing Officer be someone whom he knew, but not someone Picozzi's attorneys knew. Specific suggestions for Hearing Officers were rejected by Sandalow's counsel for the most frivolous reasons. For example, Michigan attorney John Fillion was rejected as a Hearing Officer because Fillion "is counsel to the UAW and is unacceptable since the UAW will not let me park my Porsche in their lot." Finally, both sides agreed that each would name an arbiter and that the two arbiters would make a binding selection of a Hearing Officer. The arbitration plan did not succeed because Sandalow's counsel refused to consent to any of the arbiters' choices. Finally, only when the arbiter chosen by Sandalow's counsel quit in January 1985, did Sandalow's counsel agree to have Robert Guenzel act as Hearing Officer.

Sandalow's counsel, who served as prosecutor at the Disciplinary Hearing, made the testimony of gas station attendant Brian Myers the keystone of his case.[12] Myers had been on duty at an all-night gas station two blocks from the law school on March 8, 1983, the night of the fire. The one piece of potentially incriminating evidence in

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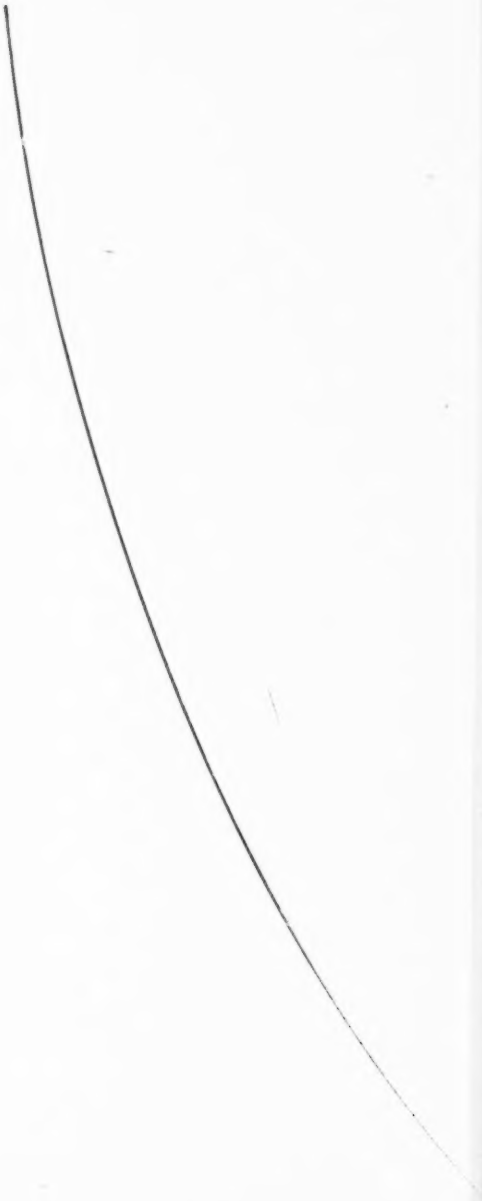
12. There were two other major prongs to Sandalow's case. The first prong was testimony by an arson expert. However, the Hearing Officer's opinion confirms that Sandalow proved nothing with the testimony of the arson expert and -- more germane to the suspension of a student in the spring of 1983 -- Sandalow's counsel did not retain his arson expert until February 1985. The second prong was medical expert testimony. Specifically, Sandalow's counsel proffered testimony that Picozzi's burns indicated that he had set the fire. Both medical experts called by Sandalow's counsel, however, testified that there was no way to tell.

the 149-page report provided to Picozzi was a March 11, 1983 interview of Myers by Detectives Jachalke and Atkinson. According to the report, Myers stated during the interview that, at approximately 1:00 a.m. on the morning of March 8th he had sold gasoline to a white male, approximately 5'9" to 5'10" tall, wearing a blue down parka, and missing two fingers on his right hand.

As it turned out, a third officer, Detective Sergeant Gerald Miller, had also been investigating the case. At the end of his late shift on March 8, 1983 -- less than 24 hours after the actual fire, and before Jachalke and Atkinson had seen Myers -- Miller had stopped at the same all-night gas station and had interviewed Myers. Miller asked Myers if he had sold a small quantity of gasoline to anyone

from 11 p.m. on March 7th until 7 a.m. on March 8th. When Myers said "no," Miller specifically asked him if he had sold any quantities of gasoline to a short, white male, who was missing two fingers on his right hand. Myers replied he had not. Although Miller took notes during the interview, he did not immediately write a report because his questions had produced negative replies.

When, just a few days later, Jachalke told Miller of the new evidence against Picozzi elicited in the second interview with Myers, Miller told Jachalke that Myers had previously denied selling gasoline to anyone, and had specifically denied selling gas to a short, white male missing two fingers on his right hand.



After speaking to Jachalke, Miller wrote a report of his interview with Myers. That report disappeared from the records of the Ann Arbor police.

Although later admitting he knew of Miller's exculpatory evidence,[13] Sandalow's counsel called Brian Myers as his star witness in the Disciplinary Hearing. Myers, in February, 1985, for the first time identified Picozzi as the

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13. At no time prior to the calling of Detective Sergeant Miller as a defense witness did any University of Michigan official ever mention him. Rather, the exculpatory evidence Miller possessed was only uncovered through the efforts of a private investigator hired by Picozzi. When challenged during the Disciplinary Hearing summation of Picozzi's attorney to explain why he had neither spoken to Detective Miller before the hearing nor mentioned him during his summation, Sandalow's counsel replied, in rebuttal, "I didn't talk to Miller because I knew what he was going to say."

man who had purchased gasoline from him -- but his story began to unravel even as he testified. Myers admitted he had spoken to Miller before speaking to Jachalke and Atkinson, but insisted that he had told all three officers the same story. Yet, now he insisted Picozzi had driven into the station while Jachalke and Atkinson testified he had earlier given them the impression that Picozzi had walked in. Myers additionally testified that not only had either Detective Jachalke or Atkinson provided him with a description of Picozzi, but also that the officers had pushed on him hard to identify the student. Most telling, though, was when Myers, who described himself as being 5'10 1/2" tall, explained how he came to realize that Picozzi was not 5'10", but rather only about 5'4". Myers testified that,

prior to his in-court identification, Sandalow's counsel had coached Myers that Picozzi was "shorter, much shorter."

Detective Jachalke, called as a witness after Myers, testified that -- except for the detail of the missing fingers -- Myers' description had always been general and contradictory. Myers had never mentioned either eye-glasses or a mustache, both of which Picozzi wore at the time of the fire. No evidence was ever found that Picozzi owned a blue parka such as the one described by Myers. Moreover, Jachalke testified, Myers had not been able to identify Picozzi's photograph. He admitted that, after having spoken with Detective Miller, he considered Myers'

testimony as being valueless.[14] Detective Miller, called as Picozzi's first defense witness, recounted the story of his interview with Myers.

The Disciplinary Hearing concluded on March 21, 1985.

The Hearing Officer filed an opinion ruling for Picozzi on August 22, 1985. In it, he stated, "Myers' testimony is inconsistent and at odds with credible testimony such as that of Sergeant Miller. I conclude that it is tainted and must discount it as the Ann Arbor police did." A letter of good standing was issued to Picozzi (App. 52), which

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14. Jackalke's conversation with Miller took place before Jackalke's conversation with Sandalow On March 31, 1983, in which Jackalke detailed the evidence.

he then immediately used to transfer to the Yale Law School.[15]

On November 12, 1985 Sandalow moved for summary judgment before Judge Feikens in this civil action. Picozzi cross-moved for summary judgment. Judge Feikens ruled for Sandalow on January 2, 1986, stating in his opinion, *inter alia*, that Sandalow had deprived Picozzi of a protected interest (App. 14; 623 F.Supp. at 1576), but that the delay in returning Picozzi to school was Picozzi's own fault. (App. 36; 623 F.Supp. at 1580.)

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15. Picozzi graduated from Yale in May, 1987. He was an Editor of the *Yale Law Journal* and recipient of the Nathan Burkan Award. He is currently an Associate at the law firm of Fried, Frank, Harris, Shriver & Jacobson in New York City. Beginning in August 1988, Picozzi will clerk for the Honorable Anthony J. Scirica of the United States Court of Appeals for the Third Circuit.

On August 28, 1987, the United States Court of Appeals for the Sixth Circuit affirmed the District Court's ruling, adopting Judge Feiken's opinion. (App. 48; 827 F.2d 770.)

REASONS FOR GRANTING THE WRIT

Review should be granted for three reasons. First, the Court should finally hold that a student at a public university has an interest in his education protected under the 14th Amendment. It should then affirm -- in this of all cases -- the responsibility of the state to provide proper notice. Second, the indefinite standard of *Goss v. Lopez* has spawned litigation. School administrators have been free to call any type of teacher-student interaction a hearing and students, consequently, have been forced to sue to obtain true process. The time has come for this

Court to make students' due process rights concrete by saying what procedures are due in specific contexts. Third, the Court must unequivocally decide whether a person who vindicates his civil rights with a lawsuit receives attorney's fees by right, or only by grace.

Responsibility For Notice

1. While this Court has avoided deciding whether students at public universities have an interest in their educations protected by the due process clause of the Fourteenth Amendment, see *Ewing v. Board of Regents of the University of Michigan*, 474 U.S. 214, 222-23 (1985), lower courts have unanimously held that they do. See, e.g., *Ewing v. Board of Regents of the University of Michigan*, 742 F.2d 913, 915 (6th Cir. 1984); *Gaspar v. Bruton*,

513 F.2d 843, 850 (10th Cir. 1975); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied* 368 U.S. 930 (1961).

Goss v. Lopez, 419 U.S. 565, 579 (1975) affirmed the due process rights of public school students facing interference with those interests for disciplinary reasons, including the rights to "some kind of notice and . . . some kind of hearing." *Id.* at 579. At a minimum, stated this Court in *Goss*, notice must inform the student of "what he is accused of doing and what the basis of the accusation is." *Id.* at 582. Moreover, the requirement of adequate notice is invariably stressed as a precondition to a fair hearing because the right to a hearing "has little reality or worth unless one is informed that the matter is pending and

can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Central Hanover Trust Company*, 339 U.S. 306, 314 (1950); *accord*, *Goss v. Lopez*, 419 U.S. at 579.

2. Respondent Sandalow argued below that he had no obligation to provide notice until Picozzi stated he would contest disenrollment. Specifically, while Sandalow had already told Picozzi in the May 13 letter that he could not re-enroll (App. 50), until Picozzi said he wanted to return to law school, Sandalow argues he had not deprived Picozzi of anything. He admits he never charged Picozzi with anything.[16]

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16. Sandalow not only admits he never charged Picozzi, he positively trumpets the fact. See Sandalow's affidavit of October 15, 1985, ¶ 6: "I did not at any time accuse Mr. Picozzi of responsibility for the

Footnote Continued

Thus, his argument runs, since Sandalow took no disciplinary action against Picozzi, there was no reason to give notice or to take any other affirmative steps.[17] Yet, at the same time, Picozzi was barred from school and denied the requisite letter of good standing.

Sandalow further took the position that Picozzi's request for a letter of

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16. Footnote Continued From Previous Page

March 8 fire." (Attached to Motion by Defendant Sandalow for Summary Judgment.) *See also* Reply Brief of Defendant Sandalow on Motion for Summary Judgment, at p. 3: "First Sandalow never accused Picozzi of anything."

17. "Since Picozzi had not been accused of anything and since no disciplinary action had been taken against him, there was nothing of which to give notice." Reply Brief of Defendant Sandalow on Motion For Summary Judgment at p. 5.

good standing (i.e., a letter stating that Picozzi was free to re-enroll) was not the same as asking to re-enroll. A letter of good standing, according to Sandalow, is a matter of grace, analogous to a letter of recommendation. Consequently, by withholding one from Picozzi he was not depriving him of a protected interest and, again, had no duty to move forward with notice and a hearing.

3. The District Court wasted little time in piercing so contrived and transparent a fiction.[18] Judge Feikens held that Sandalow's refusal to issue the letter altered Picozzi's status at the Law School and made it

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18. As the Court of Appeals adopted the District Court opinion (App. 53), for simplicity all arguments will refer only to the District Court.

impossible for him freely to pursue his studies there or at any other accredited law school. (App. 14; 623 F. Supp. at 1576.) The controversy over the letter reflected the "underlying dispute" over Picozzi's status at the University. (App. 17; 623 F. Supp. at 1576.)

Based on this analysis, Judge Feikens found the following: 1) that a letter of good standing is a protected interest (App. 14; 623 F.Supp. at 1576); 2) that Sandalow deprived Picozzi of that protected interest (Id.); and 3) that the deprivation could not legally take place without due process, including notice.[19] (App. 22, 23; 623

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19. Without such a letter, most universities will not consider the student's application on its merits at all; in certain

Footnote Continued

F.Supp. at 1577, 1580.)

Yet, the District Court then went on to find Picozzi received adequate notice in the May 13 letter -- even though the letter made no charge, identified no evidence and no rules of procedure -- and which Sandalow himself admits was not notice (App. 33; 623 F.Supp. at 1580). In essence, the District Court opinion placed the burden on Picozzi to have moved ahead and bound himself to a hearing to be devised after the fact, where Picozzi would have had

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19. Footnote Continued From Previous Page

graduate-professional fields, such as law and medicine, no schools will accept a student who cannot produce such a letter. See Picozzi's own Note, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 Yale L. J. 2131, 2138-39 (1987) [hereinafter Picozzi, *Disciplinary Process*].

to clear himself of suspicion against unspecified charges.

4. Review is appropriate on this issue because, if allowed to stand, the District Court's opinion will destroy a basic tenet of due process -- that one must receive notice of a charge, evidence and procedures before deciding whether to contest. The District Court's rule would impoverish the due process rights not just of students, but of a broad spectrum of vulnerable individuals, especially those who cannot afford legal counsel. It shifts the burden onto the person deprived to vindicate his procedural rights -- assuming he knows that he possesses such rights. It creates the procedural equivalent of placing someone in jail and then doing nothing unless he requests an indictment.

Instead, the responsibility to ensure that a person receives his procedural due should lie with the same authority that takes his property or liberty. The meaning of the 14th Amendment is quite plain on its face: the State shall provide due process of law.

5. While the facts of this case are egregious -- a law school dean who suspends a student indefinitely without ever bringing a charge or identifying evidence -- the implications extend far beyond these two people or what notice should include. *Goss* protects a discrete group of people; this case is about all of them. Students are not only young and vulnerable, they have a naive sense of fairness. That sense of fairness should be protected and nurtured, for it will be trod upon soon

enough as they go through life. To protect students, and nurture their sense of fairness, is the motivating spirit of *Goss v. Lopez* -- or, at least, it should be.

If adopted, Judge Feikens' opinion will destroy some of *Goss*' procedural protections, but in so doing, it will destroy all of *Goss*' nurturing spirit. The decision whether to undercut *Goss*, consequently, affects students who will never face suspension as well. As the 5th Circuit observed:

> In the disciplining of college students there are no considerations of immediate danger to the public, or of peril to the national security, which should prevent the [University] from exercising at least the fundamental principles of fairness by giving the accused students notice of the charges and an opportunity to be heard in their own defense. Indeed, the example set by the Board in failing so to do, if not corrected by the courts, can well break the spirits of the

> expelled students and of others familiar with the injustice, and do inestimable harm to their education.

Dixon v. Alabama State Bd of Educ., 294 F.2d 150, 157 (5th Cir. 1961), *cert denied*, 368 U.S. 390 (1961).

What Kind of Hearing

1. In *Goss v. Lopez*, 419 U.S. 565, 579 (1975), this Court held that "students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and . . . some kind of hearing." The Court noted that the specific procedures provided in *Goss* were for the ten-day high school suspension involved in that case. A longer suspension or an expulsion, stated the Court, "may require more formal procedures." *Id.* at 584.

2. The District Court held that while Picozzi had an interest triggering

due process, he was not entitled to a hearing prior to deprivation of that interest (App. 24; 623 F. Supp. at 1578). The District Court reasoned that the suspension was only temporary, pending the outcome of a full hearing and, thus, did not implicate an interest as great as that of high school students in a ten-day suspension.[20] (App. 29,

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20. Judge Feikens additionally stated that this case "falls squarely within the Goss provision for situations not requiring a pre-suspension hearing." (App. 26, 623 F. Supp. at 1578.) The portion of Goss to which he referred states the following: "Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable . . . . " *Goss v. Lopez*, 419 U.S. 565, 582-83 (1975).

Judge Feikens' assertion that this case falls within that exception is

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623 F.Supp. at 1579.) Judge Feikens reaches this conclusion by erroneously

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20. Footnote Continued From Previous Page

untenable. First, as Picozzi spent the first seven weeks following the fire in various hospital beds unable to walk, and the next 6 months in a full body cast barely able to walk, it is difficult to understand how he could pose an "ongoing threat" to anyone. Second, a 2-1/2 year exclusion hardly seems the type of temporary suspension the exception contemplates. Third, and most importantly, even if Sandalow did honestly believe Picozzi to be an "ongoing threat", it does not provide a reason for Sandalow's failure to charge him. In fact, the *Goss* exception to which Judge Feikens pointed only makes clearer that, having suspended Picozzi, the burden lay on Sandalow to provide notice "as soon as practicable".

Additionally, Picozzi contests Judge Feikens' assertion that Picozzi's counsel agreed that this case falls with the *Goss* exception. (App. 26, 623 F. Supp. at 1578, n.7.) He did not. He merely acknowledged the exception and hypothetically discussed how it could apply to a student who was suspected of setting a fire. Nonetheless, even while

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and improperly finding that Picozzi caused the delay.[21] However, even if

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20. Footnote Continued From Previous Page

discussing the hypothetical, Picozzi's counsel was quick to note that with a pre-hearing suspension, notice and hearing must follow immediately thereafter -- critical events which did not occur in this case. (App. 26.)

21. Summary judgment may not be entered where material issues of fact exist. FED. R. CIV. P. 56(c). Here, Judge Feikens made two dispositive findings of fact: first, that Picozzi, rather than Sandalow, resisted holding a hearing (App. 35, 623 F. Supp. at 1580); second, he implicitly found that, had Picozzi accepted Sandalow's offer of an administrative hearing, he would have been provided with a fair procedural hearing. The Injunction Hearing transcript clearly shows that Picozzi was always ready to submit to a hearing in accordance with the Handbook Rules (App. 56-60.); it was Sandalow who refused. Whether the unspecified, "less cumbersome" hearing would have been fair is a matter for a jury. Enough evidence certainly exists in the record, even absent discovery, for a jury to find it would not have been fair.

one assumes that the burden lay with Picozzi to respond immediately to the original May 13 letter, Judge Feikens' opinion does not discuss why, after Picozzi filed this action, it still took Sandalow five months to stage a hearing and a full year before Picozzi received his letter of good standing. More importantly, Judge Feikens' opinion does not satisactorily explain why that exclusion from law school was a lesser deprivation than a ten-day suspension from high school. Most importantly, however, Judge Feikens' opinion suggests that Picozzi should have accepted Sandalow's offer, without knowing the precise, or even general, procedure to which he would be bound.

3. Review is needed on this issue because the *Goss* "some kind of hearing" standard has been an absolute disaster

for students in this country. Without a more specific requirement of exactly what procedures are due in what contexts -- and, instead, leaving procedure to be drawn by the very people against whom it should afford protection -- school officals have been free to call any kind of teacher-student meeting due process. They can appear impartial and flexible, while in fact stacking the procedural deck,[22] often

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22. For a survey of what disciplinary procedure public colleges and universities in this country have been providing, see Golden, *Procedural Due Process for Students at Public Colleges and Universities*, 11 J.L. & Educ. 337 (1982). Among responding institutions, Golden found that 36.2% did not allow cross-examination by defense -- not even by the accused student -- and 37.9% did not allow the student to have legal counsel. Staggeringly, 55.2% did not guarantee the student an impartial decisionmaker (in the form of either a hearing officer or

Footnote Continued

by deciding on the procedure after deciding on the culprit. Predictably, this has spawned litigation, as those students who could manage it brought suit to vindicate their rights.[23]

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22. Footnote Continued From Previous Page

a tribunal), 60.3% did not guarantee the student a right to confront his accusers, 75.9% did not guarantee the student written findings of fact, and 91.4% provided students with no assistance of any kind -- let alone compulsory process -- in getting specific persons to testify at proceedings. *Id.* at 345-47. Golden did not inquire as to conviction rates.

23. See, e.g., *Crook v. Baker*, 584 F.Supp. 153 (E.D. Mich. 1984), *rev'd* 813 F.2d 88 (6th Cir. 1987); *Nash v. Auburn University*, 812 F.2d 655 (11th Cir. 1987); *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113; *Jones v. Board of Governors of University of North Carolina*, 704 F.2d 713 (4th Cir. 1979); *Gabrilowitz v. Newman*, 582 F.2d 100 (1st Cir. 1979); *Gorman v. University of Rhode Island*, 646 F.Supp. 799 (D.R.I. 1986); *Jaksa v.*

Footnote Continued

The issue must be resolved once and for all. School officials need to know what procedures must be provided and students need to know upon what procedure they can rely. Rules offer no protection if administrators can simply wish them away.

4. Sandalow not following the Student Handbook Rules[24] made Picozzi

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23. Footnote Continued From Previous Page

Regents of the University of Michigan, 597 F.Supp. 1245 (E.D. Mich. 1984); *Hart v. Ferris State College*, 557 F.Supp. 1379 (W.D. Mich. 1983); *Bleiker v. Board of Trustees of Ohio State University College of Veterinary Medicine*, 485 F.Supp. 1381 (D.Ohio 1981). For a more complete examination of these and other student discipline cases, as well as an analysis of the burdens a student faces when his university employs unfair procedure, see Picozzi, *Disciplinary Process*, *supra*, note 19.

24. See supra note 8.

suspect the Dean would try to bind him to a hearing with less procedure. Picozzi was right. At the Injunction Hearing, Sandalow's counsel not only admitted that a specific procedure had not been decided upon (App. 54), but also that Sandalow intended to give Picozzi less procedure than that provided in the Handbook. (App. 55.)

By fighting for fair procedures, rather than simply accepting whatever Sandalow deigned to provide, Picozzi proved that due process need not be an empty phrase. Specifically, by bringing this civil action, he won the right to limited discovery, counsel, and cross-examination -- without any of which he would not have exposed the false testimony of Brian Myers and, ultimately, saved his legal career.

Sandalow, at any time, simply could have charged Picozzi under the Law School's published procedures, but did not. And he has never been made to explain why not.

The reason, however, is self-evident: the Handbook Rules were fair and Sandalow knew there was no credible evidence Picozzi set the fire. So, he ignored the Rules and the procedural elements they contained.

Instead, he suspended Picozzi without providing notice, hoping Picozzi would either 1) incriminate himself with a polygraph examination administered by the Ann Arbor Police, or 2) agree to a less formal hearing where he could be convicted, or 3) face the prospect of suing the Dean of the Michigan Law School in the Eastern District of Michigan, or 4) just go away. The one

thing Sandalow did not offer, or ever want to do, was to try to prove Picozzi set the fire in a procedurally adequate hearing.

6. This case illustrates why process must be provided before, not after, the deprivation of a protected interest. That Picozzi ultimately returned to law school does not make the injury whole. It does not replace 2 1/2 years lost to anxiety. It does not replace 2 1/2 years of lost wages. Most of all, it does not provide a sufficient answer when colleagues and potential employers ask about 2 1/2 missing years.

Prevailing Party

1. This Court has long held that a "prevailing party" in an action covered by 42 U.S.C. § 1988 should recover attorney's fees absent special

circumstances. See, e.g., *Kentucky v. Graham*, 473 U.S. 159, 164 (1985). Reading the legislative history of the statute more closely, the United States Court of Appeals for the Sixth Circuit articulated the rule this way:

> This statute did more than simply enable the lower courts once again to award fees; rather than being an equitable remedy, flexibly applied in those circumstances which the court considers appropriate, it is now a statutory remedy, and the courts are obligated to apply the standards and guidelines provided by the legislature in making an award of fees.

Northcross v. Board of Ed., 611 F.2d 624, 636 (6th Cir. 1979) (emphasis in the original), *cert. denied*, 447 U.S. 911 (1980).

More importantly, prior decisions of this Court should leave no doubt that a prevailing party includes a plaintiff who succeeds in obtaining relief by way of a settlement. *Smith v. Robinson*, 468

U.S. 992, 1006 (1984); *Maher v. Gagne*, 448 U.S. 122, 132 (1980).

2. The District Court raised the issue of attorney's fees sua sponte (no motion having yet been made by Picozzi) and then denied them. (App. 44-46; 623 F.Supp. at 1582-83.) Judge Feikens based his ruling not only on the presumption that there had been no due process violation, but on the fact that he had never issued the injunction for a letter of good standing and, therefore, Picozzi could not be a prevailing party. Straining to protect U-M officials, Judge Feikens stated further that, even if Picozzi were a prevailing party, he would use his "discretion" to deny attorney's fees in any event, but did not explain why. (App. 46; 623 F.Supp. at 1583 n. 12.)

3. By bringing this civil rights action, Picozzi got what he sought -- due process by which he could vindicate himself and, ultimately, claim his letter of good standing. Again, the transcript of the Injunction Hearing makes clear first, that Sandalow sought to give Picozzi less process than was due and, second, that it was Sandalow, not Picozzi, who resisted holding an adequate hearing. (App. 54-55, 60-61.) Undeniably, the only reason Sandalow finally had to say what procedure he was offering was because Picozzi forced him into court and a Federal judge posed the question.

Furthermore, without the procedures won in Judge Feikens' courtroom, especially the limited discovery and cross-examination rights, the false identification by Brian Myers

never would have been exposed. The conduct of Sandalow's counsel makes clear that he had no intention of divulging Detective Miller's exculpatory information.

4. Review is appropriate on this issue for two reasons. First, as long as federal judges believe that awarding attorney's fees under § 1988 is at their pleasure, rather than their obligation, the statute will not have its intended effect of stimulating civil rights actions.

Second, and what should be much more troubling, is that failure to award attorney's fees turns the judicial system into a shield which protects those who violate civil rights, rather than a sword to attack them. A person whose civil rights have been violated must not only acquire the capital to

bring a lawsuit, he must consider whether he can afford ultimately to pay off the cost even if he wins. This entire litigation, including the Disciplinary Hearing, has cost James Picozzi more than twice what tuition to law school cost him, all to receive process which should have been his -- not for the asking -- but rather without asking, let alone suing. Thousands of other people, whose names do not appear in the West Reporter system, have not been able to afford that cost. Whether a novel issue of law or not, the Supreme Court of the United States should never knowingly allow that number to grow.

CONCLUSION

This case is about many things, but perhaps most of all, it is about the way the legal community examines itself. A process which, because of the parties, should have been a model for fair procedure instead was a travesty -- inflicting much greater trauma and permanent harm on James Picozzi than the fire which almost killed him. It should not be allowed to go unexamined, swept under the rug by a questionable summary judgment.

For each of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMES M. PICOZZI,

Plaintiff,

v.

TERRANCE SANDALOW, Individually and in his Official Capacity as Dean of the University of Michigan Law School; et al.,

Defendants.

Civil Action No. 84-CV-7406-AA

Honorable John Feikens

OPINION

Plaintiff James M. Picozzi ("Picozzi") brings this action against defendant Dean Terrance Sandalow[1]

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1. President Harold Shapiro and the University of Michigan Board of Regents are also defendants. Picozzi's counsel agreed on the record before me to dismiss the Board of Regents based on their

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("Sandalow") citing the Constitution of the United States and 28 U.S.C. § 1983, seeking both injunctive and monetary relief. Since an administrative hearing held pursuant to the parties' agreement resolved Picozzi's claim for injunctive

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1. Footnote Continued From Previous Page

Eleventh Amendment immunity. No stipulation and order of dismissal has yet been filed with the Court. I therefore order the dismissal with prejudice of the Board of Regents, thus conforming the record to counsel's agreement with me.

The Eleventh Amendment also provides immunity to Sandalow and Shapiro in their official capacities. Accordingly, I order that these defendants, in their official capacities, be dismissed with prejudice.

This leaves Shapiro and Sandalow as defendants in their individual capacities. This opinion deals primarily with defendant Sandalow's liability. Accordingly, unless otherwise indicated, a reference to "defendant" means "defendant Sandalow." I dismiss with prejudice defendant Shapiro for the reasons given infra, pp. 24-25.

relief,[2] only his damage claim remains before me. Both Picozzi and Sandalow move for Summary Judgment. I have jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343.

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2. On August 24, 1984, Picozzi filed a verified complaint seeking a preliminary injunction ordering Sandalow to issue a letter of unqualified good standing on behalf of Picozzi. During a hearing on Picozzi's Motion for Preliminary Injunction, the parties agreed to resolve through an administrative hearing the questions of Picozzi's responsibility for the March 8, 1983, fire, and of his standing at the Law School. The Hearing Officer issued his decision "that the University of Michigan has not, by clear and convincing evidence, established that James M. Picozzi started the fire in Room K-33 at the University of Michigan Law School on March 8, 1983" on August 22, 1985. Hearing Officer's Decision at 42. Pursuant to this decision, Sandalow issued a letter of good standing on August 23, 1985. After presenting this letter, Picozzi was accepted by Yale Law School, where he is currently enrolled. Picozzi Supplemental Affidavit ¶¶ 7, 8.

1. FACTS

During his second year at the University of Michigan Law School, Picozzi leased room K-33 in the Lawyers Club, the law school student residence. At about 4:00 a.m. on March 8, 1983, fire broke out in his room. Picozzi alleges that he awoke and attempted to leave the room and that because flames blocked the doorway to the hall, he used the third floor window to exit the room. He says he attempted initially to stay on the windowsill, but eventually either jumped or fell to the ground. As a result, he sustained burns and a fractured vertebra. He was treated at the University of Michigan Hospital from March 8 to April 2, 1983; he then transferred to the University of Pittsburgh Hospital in order to be closer to his family. He remained hospitalized until sometime in May,

1983, and in a body cast until October, 1983.

By April, 1983, it appeared that Picozzi would be physically unable to return to school, during the 1983 Winter Term. On April 1, 1983, Associate Dean Eklund informed Picozzi's father that Picozzi had been disenrolled for the remainder of the 1983 Winter Term. See Complaint, Ex. J. Sandalow maintains, as recited in Dean Eklund's letter, that Picozzi was disenrolled at the request of Picozzi's father, in order to facilitate tuition and lease rebates. Although Picozzi denies that either he or his father ever requested disenrollment, it is clear that his father at least sought information regarding tuition adjustments for students absent from school for an extended period for medical reasons. See Complaint, Ex. K. I note that this

factual dispute is not material to resolution of the case.

The fire aroused concern within the Law School community. In its March 16, 1983, edition, the Law School newspaper, Res Gestae, carried a front page story of the fire and its aftermath. The story included Sandalow's statement expressing distress over the incident and urging that rumors be quelled. See Complaint, Ex. G. On April 4, 1983, Sandalow again addressed the Law School community in an effort to calm the understandable anxiety created by acts of violence, including the fire within the dormitory. See Complaint, Ex. I.

Both public statements alluded to an ongoing police investigation of the fire. That investigation led the Ann Arbor Police Department to conclude almost immediately that the fire had been deliberately set. See Complaint,

Ex. A at 15, 17. The investigators also concluded that Picozzi himself had likely set the fire. See Complaint, Ex. A at 115-16. Nonetheless, the Washtenaw County Prosecutor's Office declined to prosecute the case. See Complaint, Ex. A at 116, 118.

On May 13, 1983, Sandalow wrote Picozzi informing him that he would not be allowed to re-enroll at the Law School unless he either took and passed a polygraph test conducted by the police department or prevailed at an administrative hearing. Sandalow noted that "the Law School and the University have an independent interest in determining the identity of the person responsible, especially because the continuing presence of that individual within the community would create a serious risk to its members." Complaint, Ex. N. On June 29, 1983,

Sandalow again wrote to Picozzi asking for a prompt reply in the interest of resolving the matter prior to the beginning of the 1983 Fall Term. See Complaint, Ex. G.

Picozzi responded to Sandalow's letters on July 18, 1983, stating that he was "not yet prepared to give a full response to [defendant's] ultimatum." Sandalow Affidavit, First Attachment. Although Sandalow replied on July 29, 1983, his letter was returned unclaimed. Sandalow Affidavit ¶ 6 and Second Attachment. In any event, the matter was not resolved prior to the 1983 Fall Term.

On November 7, 1983, Picozzi requested a letter from Sandalow regarding his academic status at the Law School. See Complaint, Ex. P. On November 16, 1983, Sandalow responded:

> I am writing in response to your letter of November 7, 1983

> requesting a statement regarding your academic standing and a copy of your transcript. A copy of your transcript is enclosed.
>
> My understanding is that you are currently on a leave of absence from the Law School, having withdrawn while in good academic standing. A question remains regarding your eligibility to re-enroll. As I wrote on May 13, 1983 and again on June 29, 1983, information that we have received from the police has raised a question regarding your responsibility for the fire in your room on March 8. My hope, as I have previously written, is that the question of your responsibility might be resolved by your taking a polygraph examination as requested by the Ann Arbor Police. Were you to take and pass such an examination, under the circumstances stated in my earlier letters, you would of course be eligible to re-enroll at the Law School. If, however, you decide against taking the examination or if you fail to pass it, a hearing would be necessary to determine your eligibility to re-enroll.

Complaint, Ex. Q.

On November 23, 1983, Picozzi asked Sandalow to write James Thomas, Dean of Yale Law School, informing him that

Picozzi is "currently on leave of absence from the University of Michigan Law School, having withdrawn while in good academic standing." Complaint, Ex. R. On November 29, 1983, Sandalow replied that "it would be misleading for me to [write the requested letter] without a further statement indicating that there is a question regarding your eligibility to re-enroll at the Law School." Complaint, Ex. S. On December 5, 1983, Picozzi repeated his request for an unqualified letter. See Sandalow Affidavit, Third Attachment. Sandalow replied on December 13, 1983, with a proposed letter to Dean Thomas including an explanation regarding Picozzi's conditional eligibility to re-enroll. See Complaint, Ex. T. Picozzi rejected the proposed letter. See Complaint Ex. U. This ended the parties' communications with each other.

On July 30, 1984, Picozzi's counsel demanded that Sandalow write an unqualified letter of good standing. See Complaint, Ex. V. Sandalow refused. See Complaint, Ex. W. On August 24, 1984, Picozzi filed this lawsuit against the Regents of the University of Michigan, President Shapiro, and Dean Sandalow.

His complaint contains five counts. Count I alleges that defendant deprived plaintiff of liberty and property without due process of law. Count II alleges that defendant violated plaintiff's right to equal protection of the laws by conditioning his re-enrollment on successful completion of a polygraph exam or an administrative hearing. Count III alleges that defendant unconstitutionally conditioned the enjoyment of plaintiff's liberty and property upon plaintiff's waiver of his

privilege against self-incrimination. Count IV summarily alleges that an "ex parte and ultra vires adjudicative mechanism" violated plaintiff's rights to equal protection of the law. Complaint ¶ 122. Count V alleges that defendant breached a contract with plaintiff.[3]

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3. Although Picozzi charges Sandalow in the complaint's first paragraph with intentional infliction of emotional distress, he does not state this theory in a separate count or cause of action. I must conclude that he does not assert the theory against Sandalow. Even if Picozzi had raised the theory, I would find that the allegations of the complaint fail to support such a cause of action under Michigan law. See Roberts v. Auto-Owners Insurance Company, 422 Mich. 594, 374 N.W.2d 905 (1985). Furthermore, Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 109 S.Ct. 900, 79 L.Ed.2d 67 (1984), forbids my exercise of pendent jurisdiction to award damages against state officials for violation of state law.

II. PROCEDURAL DUE PROCESS

Picozzi's core claim is that Sandalow denied him procedural due process by detrimentally altering his status at the University without first affording him a hearing. Procedural due process claims require a two-step analysis. First, I must determine whether Sandalow deprived Picozzi of any liberty or property interest. Second, assuming I so find, I must determine whether the deprivation occurred without due process. See Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972) ("once it is determined that due process applies, the question remains what process is due."); Benson v. Scott, 734 F.2d 1181, 1184 (7th Cir. 1984), cert. denied, _____ U.S. _____, 105 S.Ct. 435, 83 L.Ed.2d 361 (1984) ("The usual analysis of a due process claim proceeds sequentially.

First, one determines . . . whether a protected property interest exists at all. If such an interest is found, one determines what procedures must be followed. . . ."). In resolving these issues I note that both parties seek Summary Judgment, and that there are no material facts that are controverted.

A. Deprivation of Protected Interest

The first question I must decide is whether Sandalow deprived Picozzi of a protected interest. I hold that he did. The gravamen of Picozzi's claim is that Sandalow altered his good standing at the Law School, making it impossible for him freely to pursue his studies there or at any other accredited law school. Picozzi could not return to his studies at the University of Michigan because of conditions imposed upon his re-enrollment. He could not complete his studies at any other

accredited law school because no such law school would accept him as long as his status at the University of Michigan was less than unqualifiedly good.

A public university student has a protected interest in continuing his studies.[4] See Ewing v. Board of Regents of the University of Michigan, 742 F.2d 913, 915 (6th Cir. 1984), rev'd (other grounds), _____ U.S. _____, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985) ("[A]n implied understanding that a student shall not be arbitrarily dismissed from his university is a property interest. . . ."); Dixon v. Alabama State Board of Education, 294 F.2d 150, 157 (5th Cir. 1961), cert. denied, 368

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4. Whether the interest is best termed "property" or "liberty" is not material. What is important is that Picozzi has an interest triggering due process.

U.S. 930, 82 S.Ct. 368, 7 L.Ed.2d 193 (1961); Stroller v. College of Medicine, 562 F. Supp 403, 412 (M.D.Pa. 1983), aff'd (without opinion), 727 F.2d 1101 (3d Cir. 1984) ("[A] graduate student has a 'property' interest in continuing his studies."); Hall v. University of Minnesota, 530 F. Supp. 104, 107 (D. Minn. 1982) ("A student's interest in attending a university is a property right protected by due process."). This is as it should be. Education is the key -- or at least the prerequisite -- to many successful careers, including a career in law. See Dixon, 294 F.2d 157. When the government provides professional graduate education, it should do so within the constraints of due process.

Sandalow does not directly contest this point, but he contends vigorously that Picozzi has no protected

interest at stake in this case. He argues that Picozzi has pleaded a protected interest on only a letter of unqualified good standing and not in a general right to continue his studies. He asserts that Picozzi has no protected interest in such a letter. Of course, if Picozzi has not been deprived of a protected interest, no due process concerns arise.

Sandalow's argument construes the complaint too narrowly. Count I does allege a property deprivation in terms of a letter of good standing. Sandalow refused to issue such a letter because he had previously altered Picozzi's status at the Law School by conditioning his re-enrollment. In other words, the controversy over the letter reflected an underlying dispute over Sandalow's action temporarily and preliminarily restricting Picozzi's

ability to continue his studies. Picozzi's allegation that Sandalow's actions "in denying plaintiff a letter of good standing . . . deprived plaintiff of property without due process of law," Complaint ¶ 114, broadly construed, includes not only the controversy over the letter itself, but also the underlying dispute over Picozzi's status at the University.

The cases Sandalow cites to support his argument on this point involve interests dissimilar to the protected interest asserted by Picozzi. Gearhart v. Thorne, 768 F.2d 1072 (9th Cir 1985), Lawrence v. Acree, 665 F.2d 1319 (D.C. Cir. 1981), and Lodico v. United States, 571 F. Supp. 21 (E.D. Mich. 1982) all involve performance evaluations or letters of recommendation. Picozzi has not claimed a protected interest in a letter of

recommendation. He asked only for a letter confirming his good standing at the Law School. Sandalow refused the letter because Picozzi's status was not unqualifiedly good. Sandalow's action in altering Picozzi's status from "good" to something less than that, thus temporarily interfering with his ability to pursue his studies, is ultimately what this lawsuit tests. Cases dealing with performance evaluations and letters of recommendation simply have no relevance.

Before evaluating the adequacy of process employed, I must find not only that Picozzi has a protected interest at stake, but also that Sandalow deprived him of the interest. Although I have already held that there was a deprivation, its precise nature requires some definition.

Mathews v. Eldridge, 424 U.S. 319 (1976), helps define the deprivation in this case. In Mathews, the Court tested Social Security procedures for terminating a person's disability payments. The procedures included an evidentiary hearing prior to final termination of benefits. But the procedures also included a preliminary step permitting termination of benefits without an evidentiary hearing. At the preliminary step, the Court defined a claimant's interest as "the uninterrupted receipt of [disability payments] pending final administrative decision on his claim." Mathews, 424 U.S. at 340. The Court held that a claimant could properly be deprived of this limited interest without a prior evidentiary hearing.

In this case, the deprivation was similarly limited. Sandalow neither

imposed nor sought formal disciplinary sanctions.[5] Neither did he permanently and finally bar plaintiff's access to legal education. He simply placed a temporary and preliminary hurdle in Picozzi's path, pending the outcome of an administrative hearing. He made it clear to Picozzi that the University was ready to move ahead with a hearing at his convenience. See

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5. Picozzi has variously characterized Sandalow's action as suspension, expulsion, and de facto expulsion. Although I am bound in considering Sandalow's Motion for Summary Judgment to accept Picozzi's factual allegations as true (at least where the allegations are not contradicted by unanswered affidavit), nothing requires me to accept Picozzi's characterization of the factual allegations. No factual allegations support Picozzi's characterization of Sandalow's action. Cf. Prelim. Inj. Trans. at 37 ("[Defendants' counsel]): [W]e are not seeking to discipline Mr. Picozzi by these proceedings. We are seeking to determine whether or not he can be re-enrolled in good standing.").

Complaint, Ex. O. Picozzi resisted the hearing. Even as late as August 30 and 31, 1984, during a hearing on his Motion for Preliminary Injunction, Picozzi continued to oppose a hearing.[6]

Although limited, the deprivation in this case is enough to trigger due process protection. Application of due process does not depend upon the weight of the interest, but upon the nature of the interest. See Goss v. Lopez, 419 U.S. 565, 575-76 (1975); Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972). I have already held that Picozzi had a protected interest in continuing his studies at the University. By burdening this interest, Sandalow triggered due process protections for plaintiff.

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6. See Preliminary Injunction Transcript at 14-18, 27-29.

B. Adequacy of Process

Although the weight of the protected interest is not relevant in triggering application of due process, it is an important factor in determining the precise procedure due in a particular case. To guide decision of what process is due in a particular case, the Court has articulated broad principles of due process. In general, the decision involves balancing government interests with private interests. Mathews, 424 U.S. at 334. More specifically, the Court stated:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the

> additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 334-35. I now apply these principles to this case and hold that defendant fully complied with the requirements of due process.

1. Pre-deprivation Hearing

The first question I must decide is whether Picozzi was entitled to a hearing prior to Sandalow's action depriving him of his interest in continuing his education pending the outcome of a full administrative hearing. I hold that he was not entitled to a hearing prior to deprivation of this limited interest. In Goss, supra, the Court applied procedural due process principles to an analogous, although more severe, situation of formal school discipline. The Court held that high school students facing ten-day suspensions are

ordinarily entitled to some kind of hearing prior to suspension. The Court noted that the hearing required need not involve any more than an informal discussion between the student and the disciplinarian immediately following the incident leading to discipline. Goss, 419 U.S. at 582, 584. Based on this assumption of informality, the Court concluded "that as a general rule notice and hearing should precede removal of the student from school." Goss, 419 U.S. at 582. However, the Court stopped short of rigidly requiring a pre-suspension hearing in all cases. The Court stated:

> We agree with the District Court . . . that there are recurring situations in which prior notice and hearing cannot be insisted upon. Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary

> hearing should follow as soon as practicable, as the District Court indicated.

Goss, 419 U.S. at 582-83.

This case falls squarely within the Goss provision for situations not requiring a pre-suspension hearing.[7] Sandalow's first letter to Picozzi following the fire specifically grounded Sandalow's actions in concern for the safety of the law school community. See Complaint, Ex. N. In an

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7. Picozzi's counsel conceded this during oral argument on these motions. Counsel stated that under Goss, Sandalow could have legitimately suspended Picozzi without a hearing immediately after the fire. Counsel qualified his concession by arguing that Goss permits suspension without a prior hearing only if a hearing takes place promptly after the suspension. In this case, counsel noted, the hearing took place nearly two years after the fire. I consider Picozzi's timing argument elsewhere in my opinion. See infra pp. 18-19.

earlier memorandum addressed to the law school community, Sandalow addressed a rising anxiety among the community's members over various incidents of violence, including the fire, within the community. See Complaint, Ex. I. Such anxiety disrupts academic calm. This is precisely the situation in which Goss permits suspension without a prior hearing. Cf. Joseph v. St. Charles Parish School Board, 736 F.2d 1036, 1038 n. 2 (5th Cir. 1984) (Construing Goss to permit suspension of a tenured teacher without a pre-suspension hearing where "immediate disciplinary action is necessary to prevent further disruption of the educational process.").

Even if Sandalow had not complied with Goss, I would hold that under Mathews Picozzi received all the process to which he was entitled. This case does not involve formal suspension

or any other school discipline. At stake in this case is a preliminary and temporary interference with Picozzi's interest in continuing his education pending the outcome of an administrative hearing to be held at plaintiff's convenience. See supra pp. 10-12. Although even this limited deprivation might in some cases inevitably delay a student's progress, in this case Picozzi could have promptly accepted Sandalow's offer of a hearing and cleared up his status at the Law School prior to the first date on which he was physically able to return to class,[8] further diminishing the severity of the

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8. Picozzi was hospitalized until May, 1983, and remained in a body cast until October, 1983. See Prelim. Inj. Trans. at 23. Sandalow first offered Picozzi a hearing by letter dated May 13, 1983. See Complaint, Ex. N.

deprivation. Under Mathews, the weight of the private interest affected is the first factor I must consider in determining the procedural protection required by due process. Because Picozzi's interest in this case is less weighty than the interest at stake in Goss, less procedural protection is due him than was due the plaintiffs in Goss.

Moreover, strong public interests, a second factor in Mathews' balance, supported Sandalow's action. First, he had a duty to protect the security of the law school community. He discharged his duty by conditioning Picozzi's re-enrollment on his clearing up the suspicion that naturally surrounded him as the subject of an unexplained arson fire. Second, Sandalow had a duty not to mislead other schools into thinking Picozzi was in unqualified good standing at the Law

School. If Picozzi's theory of the case prevails, Sandalow could be compelled to certify a student's unqualified good standing, even though the student was subject to suspicion, simply because the school had not yet been able to conduct a formal hearing. Dean Sandalow, and others in his position, must have in such cases the authority to take prompt and reasonable preliminary action that preserves the school's interest without finally and permanently depriving a student of his interest in continuing his education. Cf. Scheuer v. Rhodes, 416 U.S. 232, 246 (1974) ("[O]fficials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office."). This is precisely what his action accomplished in this case.

Neither the specific dictates of Goss nor the general principles of Mathews entitled Picozzi to a hearing prior to Sandalow's action conditioning Picozzi's re-enrollment on his successful completion of a polygraph test or an administrative hearing.

2. Law School Handbook

Picozzi also argues that Sandalow denied him due process by using procedures other than those outlined in the Law School Handbook for "investigating and reporting student conduct bearing upon character and fitness for the practice of law." Complaint, Exhibit H. Although I doubt whether Picozzi has sufficiently pleaded this claim as a due process deprivation (he had pleaded the matter as a contract claim), I will address it only to say that Picozzi's claim, assuming it is properly pleaded, is legally untenable.

Due process is a matter of federal constitutional law; failure to comply with state procedures does not, by itself, violate due process.[9] Board of Curators v. Horowitz, 435 U.S. 78, 92 n.8; Hall v. Medical College of Ohio at Toledo, 742 F.2d 299, 309 (6th Cir. 1984), cert. denied, 105 S. Ct. 796 (1985); Hill v. Trustees of Indiana University, 537 F.2d 248, 252 (7th Cir. 1976); Bates v. Sponberg, 547 F.2d 325 (6th Cir. 1976); Jaksa v. Regents of the University of Michigan, 597 F. Supp. 1245, 1251 (E.D. Mich. 1984).

The only question for me is whether Picozzi received constitutionally adequate notice and hearing. I have already discussed and

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9. I do not mean to imply a finding that Sandalow violated applicable state or Law School procedures.

passed upon the constitutionally adequacy of the hearing procedure. In addition, I hold that Picozzi received constitutionally adequate notice of the basis for defendant's action. "The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394 (1914). Constitutionally adequate notice is that which provides a person with sufficient information to make the eventual hearing meaningful. See Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950). Already in his first letter to Picozzi, Sandalow made it clear that the purpose of conditioning Picozzi's re-enrollment was to determine his responsibility for the fire. See Complaint, Ex. N ("The information available to us has led me to conclude that I would not be warranted in permitting you to re-enroll

without a close examination of the question whether you are the person responsible for setting the March 8 fire."). This is precisely the question that the 1985 administrative hearing finally adjudicated. Picozzi had official notice of it during May, 1983. Even if Sandalow had not made this perfectly clear by letter, I cannot believe anyone in Picozzi's position could have been unaware of the basis for the Dean's action.

3. Timing of the Administrative Hearing

Finally, Picozzi argues that the administrative hearing ultimately held should have taken place sooner than it did, even if not prior to Sandalow's preliminary action. Picozzi relies upon Goss which permits suspension in some cases without a pre-suspension hearing, but requires in those cases that a hearing follow

suspension "as soon as practicable." Goss, 419 U.S. at 583. Picozzi argues that Sandalow failed to satisfy this requirement. I reject this argument.

First, Sandalow had no duty in this case to satisfy the strictures of Goss. See supra pp. 10-12, 15-16. Second, Picozzi himself is responsible for the delay in the hearing's commencement. In both his first and second letters to Picozzi, Sandalow urged prompt reply. See Complaint, Exs. N, O. In his second letter, Sandalow expressed his hope that the entire matter could be resolved prior to the beginning of 1983 Fall Term. See Complaint, Ex. O. Unfortunately, Picozzi's medical condition prevented such an early disposition of the matter. But even after he recovered, Picozzi -- not Sandalow -- resisted holding a hearing. See Prelim. Inj. Trans. at 14-18,

27-29. Picozzi cannot now complain of the delay he occasioned.

C. Qualified Immunity

Even if Sandalow did violate Picozzi's procedural due process rights, and I hold he did not, I also hold that Sandalow is entitled on the facts of this case to qualified immunity. Qualified immunity seeks to provide state and federal officials, acting reasonably, with the authority to make difficult decisions and to exercise discretion without fear of being held to answer in damages. See Wood v. Strickland, 420 U.S. 308, 319-20 (1975). In the words of the Supreme Court:

> Even defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard.

Davis v. Scherer, 104 S. Ct. 3012, 3018 (1984). It is now clear that qualified immunity shields officials from damage liability as long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). See also, Davis, 104 S. Ct. at 3018; Windsor v. The Tennessean, 719 F.2d 155, 165 (6th Cir. 1983), cert. denied, 105 S. Ct. 105 (1984).

In this case, Sandalow's action was objectively reasonable because it did not violate a clearly established right of which a reasonable person would have known. Neither Goss, Mathews, nor any other federal law[10] clearly requires a

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10. Only federal law is relevant to the application of qualified immunity. See Davis, 104 S. Ct. at 3019-21.

hearing prior to the preliminary action Sandalow took in this case. He faced a situation calling for prompt action and requiring reliance on information supplied by other people, precisely the situation in which Wood calls for application of the qualified immunity doctrine. Wood, 420 U.S. at 319, quoting Scheuer, 416 U.S. at 246 ("As with executive officers faced with instances of civil disobedience, school officials, confronted with student behavior causing or threatening disruption, also have an 'obvious need for prompt action, and decisions must be made in reliance on factual information supplied by others.'"). He responded by altering Picozzi's status pending the outcome of a polygraph test, or a full administrative hearing. Even if this action violated Picozzi's constitutional right, Sandalow cannot be held liable

for damages because the right violated was not clearly established at the time he took the action.

III. OTHER MATTERS

A. Equal Protection

Counts II and IV of the complaint allege that Sandalow denied Picozzi equal protection by treating him differently than other students at the University. It is true that Sandalow conditioned the re-enrollment rights of Picozzi only. But he rightfully treated Picozzi differently than other students because Picozzi was not similarly situated with any other student. The unexplained arson fire took place in Picozzi's room, and no one else's room. No other student was seen near Picozzi's room at the time of the fire. In fact, the Ann Arbor Police Department informed Sandalow that they considered Picozzi the primary, if not the only, suspect.

See Sandalow Affidavit ¶ 4. These factors provided a rational basis for his action with respect to Picozzi. Since Picozzi is not alleging denial of a fundamental right or a classification based on suspect class lines, this is all equal protection requires. See, e.g., Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 271-73.

B. Self-Incrimination

Picozzi alleges in Count III that Sandalow deprived him of his privilege against self-incrimination. Although the complaint does not articulate a theory for this cause of action, he argues in his brief that Sandalow deprived him of his privilege by asking him to submit to a polygraph test. In Picozzi's words:

> This request imposed an unconstitutional choice upon Mr. Picozzi. He either had to waive his right to silence . . . or he

> had to request an administrative hearing at which his failure to take the examination was to be considered substantive evidence of his guilt.

Plaintiff's Brief at 20. I hold that Picozzi was not deprived of his privilege against self-incrimination by Sandalow's request that plaintiff take a polygraph test.

Sandalow never conditioned Picozzi's re-enrollment rights on a polygraph test. He presented the polygraph test to Picozzi as an option to accept or reject. In fact, if Picozzi submitted to a polygraph test and failed, Sandalow would still have permitted him to go through an administrative hearing. See Complaint, Ex. Q ("If, however, you decide against taking the examination or if you fail to pass it, a hearing would be necessary to determine your eligibility to re-enroll."). That Picozzi's refusal

to take the test might be used at the administrative hearing as evidence that he set the fire does not threaten his privilege. In the first place, the refusal would have virtually no probative value because Sandalow gave him the option of a polygraph or a hearing. I do not think this point would escape the attention of a qualified hearing officer. Furthermore, even though a person may assert the privilege against self-incrimination during a civil proceeding, the privilege protects a person from only criminal exposure. See, e.g., Kastigar v. United States, 406 U.S. 441, 444 (1972). The administrative hearing was a civil proceeding.

C. Contract

Count V of Picozzi's complaint alleges that he entered into a contract

with the University upon enrollment at the Law School, and that the terms of this contract were contained in the Law School Handbook. He alleges that Sandalow breached this contract by failing to use the disciplinary procedures contained in the handbook. I reject this claim because I hold as a matter of law that Picozzi never entered into a contract to be governed by the procedures contained in the Law School Handbook. Even if he did enter into such a contract, I hold that Sandalow did not breach it in the manner alleged because Sandalow never sought to discipline Picozzi. Furthermore, Pennhurst, supra, forbids me from exercising pendent jurisdiction over a state law claim against state officials for the purpose of ordering state officials to comply with state law, or

of assessing damages against state officials for violation of state law.[11]

D. Defendant Shapiro

Plaintiff's counsel stated before me on the record that he was retaining defendant Shapiro solely to preserve a motion for § 1988 attorney fees arising out of the Preliminary Injunction hearing and the administrative hearing. Although Picozzi has not presented the Court with a formal motion for fees, I sua sponte consider the matter now.

Under 42 U.S.C. § 1988, attorney fees are available to civil rights claimants. But no such fees may

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11. Pennhurst's rationale does not forbid me from exercising pendent jurisdiction to rule that state officials complied with state law. Such a ruling by a federal court is not an "intrusion or state sovereignty." Pennhurst, 465 U.S. at 106.

be awarded unless I find the party seeking fees to be a prevailing party. I hold that Picozzi was not a prevailing party at the Preliminary Injunction hearing. He wanted me to order defendants to issue an unqualified letter of good standing on his behalf. I did not enter such an order. Instead, the parties agreed after two mornings of discussion to conduct an administrative hearing to determine Picozzi's responsibility for the fire. Although defendants pressed for the hearing, Picozzi initially resisted it. As is evident from the transcript of the hearing, Picozzi was not a prevailing party. Accordingly, he is not entitled to § 1988 fees for the Preliminary Injunction hearing.

Picozzi did prevail at the administrative hearing conducted pursuant to the parties' agreement. But

that outcome, although important to him, does not make him the prevailing party on his underlying civil rights cause of action. On the contrary, I have just held that his civil rights were not violated. Accordingly, the administrative hearing cannot support § 1988 fees.[12]

There being no reason for Shapiro to remain a defendant in this case, I order that he be dismissed with prejudice.

IV. DISPOSITION

For the reasons given in this opinion, defendant Sandalow's Motion for Summary Judgment is GRANTED on all

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12. Even if Picozzi were a prevailing party for purposes of § 1988, I would exercise my statutory discretion to deny an award of attorney fees in this case.

counts, and plaintiff Picozzi's Motion for Partial Summary Judgment is DENIED on all counts. In addition, defendants Shapiro and Board of Regents are DISMISSED with prejudice.

IT IS SO ORDERED.

_____

John Feikens
Chief United States
District Judge

Dated:

86-1136

UNITED STATED COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES M PICOZZI,	:
Plaintiff-Appellant,	:
v.	: ON APPEAL FROM THE UNITED STATES DISTRICT COURT
TERENCE SANDALOW, individually and in his official capacity as Dean of the University of Michigan Law School; HAROLD SHAPIRO: BOARD OF REGENTS, UNIVERSITY OF MICHIGAN,	: FOR THE EASTERN DISTRICT OF MICHIGAN
Defendants-Appellees.	:

BEFORE: KEITH and MORRIS, Circuit Judges; and GIBBONS[13], District Judge.

PER CURIAM: Appellant James Picozzi appeals the district court's decision

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13. Honorable Julia S. Gibbons, United States District Court for the Western District of Tennessee, sitting by designation.

granting summary judgment in favor of appellee Terence Sandalow and dismissing his claims against appellees Harold Shapiro and the Board of Regents of the University of Michigan. After a thorough review of the briefs, record and oral argument in this appeal, we AFFIRM the district court based on the well-reasoned opinion of the Honorable John Feikens, United States Court for the Eastern District of Michigan.

ISSUED AS MANDATE:
September 21, 1987

COSTS: APPELLEES TO RECOVER
Printing costs (Univ. of Mi. - $143.50)
Printing costs (Sandalow - $156.80)

May 13, 1983

Mr. James M. Picozzi
616 Sewickley Heights Drive
Sewickley Heights Manor Drive Condo
Sewickley Heights, Pennsylvania 15143

Dear Mr. Picozzi:

I was pleased to learn from Professor Barker that your recovery is progressing well.

As you know, no criminal charges have as yet been filed in connection with the fire that was set in your room in the early morning hours on March 8. Whether or not such charges are ever filed, the Law School and the University have an independent interest in determining the identity of the person responsible, especially because the continuing presence of that individual within the community would create a serious risk to its members.

In this connection, I have been informed that the Ann Arbor police have requested that you take a polygraph test and that your father has indicated that you would be willing to do so. I am writing to notify you that if you do take a polygraph test administered or arranged by the Ann Arbor police and if that test indicates that you are not responsible for the March 8 fire, you would of course be permitted to return to the Law School in the fall term.

With regret, I must also inform you that unless you take a polygraph test, an administrative proceeding will be

required to determine whether you will be permitted to re-enroll as a student. The information available to us has led me to conclude that I would not be warranted in permitting you to re-enroll without a close examination of the question whether you are the person responsible for setting the March 8 fire.

The necessity for such a proceeding would, of course, be obviated if you were to take and pass a polygraph test, and I of course hope that you will pursue that course. I would appreciate it if you would notify me of your plans within the next several weeks.

Sincerely,

Terrance Sandalow
Dean

TS:lf

August 23, 1985

To Whom It May Concern:

James M. Picozzi is a student in good standing at the University of Michigan Law School and is eligible to return.

Susan M. Eklund
Associate Dean

SME:lf

Hearing to Show Cause Why Preliminary
Injunction Should Not Issue
August 30, 1984

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
August 30, 1984 -- 9:00 A.M.

JAMES M. PICOZZI

Plaintiff,

-against-

TERRANCE SANDALOW, Individually and in his Official Capacity as Dean of the University of Michigan Law School; HAROLD SHAPIRO, Individually and in his Official Capacity as President of the University of Michigan; and the Board of Regents of the University of Michigan,

Defendants.

APPEARANCES:

MARK B. GOMBINER, ESQ.
RONALD L. KUBY, ESQ.
Attorneys for Plaintiff

PETER A. DAVIS, ESQ.
Attorney for Defendants

MR. GOMBINER: I would like to explore this and get further information from counsel for the other side. If there was to be an administrative hearing, would they stipulate that the administrative hearing would be in accordance with the University of Michigan Handbook?

MR. DAVIS: Well, the rules and regulations attached to the Complaint do not apply to this kind of situation. That's one of the problems that we have with their Complaint. It is that they attached this detailed procedure, somewhat cumbersome procedure which was never intended to apply to this kind of case. It was intended to apply to different infractions in the University.

There is no procedure in place as to how the hearing should be conducted. Dean Ecklund, who will testify at length as to the kind of procedure that they

are referring to that would be utilized for this kind of hearing.

THE COURT: Do I take from the response, Mr. Davis, that the hearing that you are referring to that would be held would be less cumbersome, less intricate but there would be given to Mr. Picozzi a full opportunity to give his side of it?

MR. DAVIS: Absolutely, and I would hope I can work out the terms with counsel. It depends a lot on the availability of witnesses or whether they are willing to stipulate to the police report, and so forth, which contains a lot of hearsay.

MR. GOMBINER: We do not stipulate that the rules and regulations [do not] apply to this kind of proceeding. We think they do apply to this sort of incident.

Secondly, what Mr. Davis is suggesting here is that the more serious the offense, the less due process.

* * *

MR. GOMBINER: The position secondly, if there is to be an administrative proceeding, that he is entitled, one, to an administrative proceeding in accordance with the rules and regulations that have been set forth in the University of Michigan handbook; and two, that he is entitled to be formally charged with some offense -- and one of the essential elements of the due process is certainly notice, and that he has not, in fact, received adequate notice. He has not been charged with anything. He is being switched around. He is being asked: "Even though you haven't been charged

with anything, you have to come forth and clear your name," which also suggests that he has to sustain the burden, that he has the burden of proving he didn't do something when he hasn't been charged with anything. So, we don't want to do that.

* * *

THE COURT: No, right now. Is it your position that he will submit to an administrative hearing as provided for in the regulations?

Yes or no?

MR. GOMBINER: Judge -- yes, Judge.

THE COURT: Well, you can't have it both ways.

MR. GOMBINER: Well, he would submit to a procedure as provided for in the University rules and regulations. And I would call to the Court's attention that

part of the procedure is that he be formally charged.

THE COURT: No, no. I didn't ask you to --

MR. GOMBINER: Well, that is part of the procedure.

THE COURT: Well, I don't know what the regulations say, but if you start to engraft --

MR. GOMBINER: Judge, Mr. Picozzi would have always been delighted if the University of Michigan had complied with their own rules and regulations.

* * *

Hearing to Show Cause Why Preliminary
Injunction Should Not Issue
August 31, 1984

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
August 31, 1984 -- 9:00 A.M.

JAMES M. PICOZZI,

Plaintiff,

-against-

TERRANCE SANDALOW, Individually and in his Official Capacity as Dean of the University of Michigan Law School; HAROLD SHAPIRO, Individually and in his Official Capacity as President of the University of Michigan; and the Board of Regents of the University of Michigan,

Defendants.

APPEARANCES:

MARK B. GOMBINER, ESQ.
RONALD L. KUBY, ESQ.
Attorneys for Plaintiff

PETER A. DAVIS, ESQ.
Attorney for Defendants

THE COURT: Tell me right now: will you have a hearing under the regulations without any ifs and, or buts?

MR. GOMBINER: Without any ifs, ands, or buts, we are willing to have a hearing, without any qualms about that.

THE COURT: What is Mr. Ruby saying?

MR. GOMBINER: Judge, the disagreement is on their part.

THE COURT: Mr. Davis, will you apply the rules and regulations?

MR. DAVIS: Part of the rules and regulations have no applicability at all because it does not call for the Defendant to be able to buy his way out of it.

Your honor, I think the Defendants have been sandbagged because there was a time when all students were on campus, we could have had the hearing under those rules, even though they contended that the rules did not apply. Now, it is different.

THE COURT: You always said that he was entitled to an administrative hearing.

MR. DAVIS: Dean Sandalow had a hearing which would give him his due process rights. This hearing is cumbersome.

THE COURT: Why don't you say right here on this record what kind of administrative hearing it will be, and Mr. Gombiner can say yes or no.

MR. DAVIS: Can I have five minutes to talk to Dean Sandalow?

THE COURT: Yes, but we will stay in session.

(Discussion off the record.)

Summary Judgment Hearing

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
November 12, 1985 -- 2:00 P.M.

JAMES M. PICOZZI

Plaintiff,

-against-

TERRANCE SANDALOW, Individually and in his Official Capacity as Dean of the University of Michigan Law School; HAROLD SHAPIRO, Individually and in his Official Capacity as President of the University of Michigan; and the Board of Regents of the University of Michigan,

Defendants.

APPEARANCES:

MARK B. GOMBINER, Esq., appearing on behalf of the Plaintiff.

THEODORE SACHS, Esq., and PETER A. DAVIS, Esq., appearing on behalf of the Defendants.

THE COURT: So, you do say there can be circumstances for the immediate removal from school, if there is a threat or the interruption of the academic process or posing a danger to persons and property?

MR. GOMBINER: Your Honor, I cited a number of cases, Prysbylowitz v. Newman (sp), Gardenheier v. Chalmers (sp), Strickland v. Board of Regents.

THE COURT: My question is this: If that is what Goss means, what would you call that? Would you call it expulsion, suspension?

MR. GOMBINER: I call that suspension.

THE COURT: But it wouldn't be an unlawful suspension would it?

MR. GOMBINER: No, just suspension.

THE COURT: It would not be unlawful, would it?

MR. GOMBINER: No, it wouldn't.

It would be unlawful, as Goss points out, and numerous other cases point out -- if they did that and not, very quickly, give adequate notice of a hearing.

This is the specific holding of Goss v. Lopez, and the specific holding of many other cases. They couldn't do that and say: "Well, he is not in school." Then they are under a particular obligation under Goss v. Lopez to quickly provide adequate notice and hearing.

THE COURT: I have no further questions.

Supreme Court, U.S.
FILED
DEC 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1007

In The

Supreme Court of the United States

October Term, 1987

JAMES M. PICOZZI,

Petitioner,

v.

TERRANCE SANDALOW,
individually and in his official capacity
as Dean of the University of Michigan Law School,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

– AND APPENDICES –

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COUNTER-STATEMENT OF QUESTION PRESENTED

WHETHER RESPONDENT LAW SCHOOL DEAN DENIED PETITIONER, A SUSPECTED DORMITORY ARSONIST, CLEARLY ESTABLISHED DUE PROCESS RIGHTS, WHERE PETITIONER WAS PHYSICALLY INCAPACITATED FROM ATTENDING SCHOOL, AND WHERE PETITIONER DECLINED REPEATED OFFERS OF AN ADMINISTRATIVE HEARING IF HE WISHED TO RE-ENROLL.

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No. 87-1007

In The

Supreme Court of the United States

October Term, 1987

JAMES M. PICOZZI,

Petitioner,

v.

TERRANCE SANDALOW,
individually and in his official capacity
as Dean of the University of Michigan Law School,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

Petitioner, James Picozzi, a former University of Michigan Law School student suspected by the police of having committed arson by setting fire to his Law School dormitory room, filed this lawsuit against Respondent, University of Michigan Law School Dean Terrance Sandalow, and other University officials to obtain an unqualified letter of academic good standing, and for damages. The United States District Court for the Eastern District of Michigan, Hon. John Feikens, granted Respondent's motion for summary judgment; and

the Court of Appeals for the Sixth Circuit affirmed. The facts as related herein are based upon the record below.[1]

At approximately 4:00 a.m. on March 8, 1983, a fire broke out in the University of Michigan Law Quad dormitory room leased and occupied by Petitioner James Picozzi, a second-year law student. (Comp., ¶ 23)[2] Petitioner suffered flash burns and smoke inhalation, and eventually escaped the fire by jumping or falling from his third-story window, with resultant injuries to his back. (Comp., ¶¶ 23, 25) Petitioner was removed to the University of Michigan Hospital for treatment of his burns and back injury, and later removed to the University of Pittsburgh Hospital. (Comp.,

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[1] Petitioner's Statement of the Case is to a large degree premised on opinion, inference and innuendo, and *not* upon evidence contained in the record below. For example, the record below *nowhere* establishes, as Petitioner recites, that "unknown persons" opened the door to Petitioner's room and splashed gasoline inside (Petition for Certiorari, p. 6), or that the University of Michigan Law School Director of Housing "fabricated a story" to coax Petitioner to allow a search of his room (Petition for Certiorari, p. 3), or that the Law School Assistant Dean instructed a subordinate to "hide her role" in any manner from Petitioner (Petition for Certiorari, p. 4). These are not statements of fact, and are nowhere grounded in the record.

Furthermore, Petitioner refers extensively to matters adduced at an administrative hearing held in March, 1985. (See Petition for Certiorari, p. 2) The administrative hearing took place after the lawsuit was filed, and over a year after the latest action relevant to Petitioner's claim against Dean Sandalow: the Dean's refusal to accede to the requested issuance of an unqualified letter of academic good standing. Moreover, the record of that hearing is not part of the record of this proceeding. Consequently, most of the "facts" presented by Petitioner with regard to the events surrounding the fire have absolutely no bearing on the dispositive issue of whether he had a right, of constitutional magnitude, to an unqualified letter of academic standing.

[2] Citations to the record below refer to paragraphs and exhibits of the Complaint, denoted, "(Comp., ¶ __)" and "(Comp., Exh. __)." The Hearing Officer's Decision, dated August 22, 1985, is denoted, "(Hrg. Off. Dec.)."

¶¶ 24, 26, 27) He remained hospitalized until May, 1983, and incapacitated in a body cast until October, 1983. (Comp., ¶¶ 27, 28)

There is no dispute that the fire in Petitioner's dormitory room was of incendiary origin. (Comp., ¶ 31)

Ann Arbor Police Department investigators conducted a thorough investigation of the blaze. (Comp., Exh. A) The police investigators concluded that the evidence pointed to the Petitioner as the prime — indeed, the only — suspect.[3] (Comp., Exh. A, pp. 44, 115-16) Petitioner had had an unpleasant and contentious first year at Michigan Law School. (Hrg. Off. Dec., pp. 3-4) He was disliked by other law students, some of whom he contended had "harassed" him. (Comp., ¶ 21; Exh. A, p. 19) Authorities suspected that Petitioner had set the fire as part of a plot to facilitate his transfer to what he hoped would be more accommodating surroundings at Yale Law School, which had previously declined his admission. (Hrg. Off. Dec., pp. 4, 9, 10)

Meanwhile, Dean Sandalow was kept apprised of the progress and results of the ongoing police investigation of the blaze. (Terrance Sandalow Affidavit, ¶¶ 4, 5, App., *infra*, pp. A-1 – A-2) The Dean acted quickly to address the fears and rumors engulfing the Law School in the wake of the dormitory fire, first in a front-page statement published in the Law School newspaper, and later

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[3] Based on the evidence indicating Petitioner's responsibility for the fire, police investigators met with the Washtenaw County Prosecutor and requested authorization for the filing of a complaint charging Petitioner with the offense of arson. Acknowledging the evidence pointing to Petitioner's involvement, the Prosecutor nevertheless declined to press charges, for reasons unstated. (Comp., Exh. A, pp. 115-16; Exh. F) The case remained "inactive," although Petitioner remained the only suspect. (Comp., ¶ 63; Exh. A, p. 116) The Prosecutor advised investigators to seek a polygraph examination, to which Petitioner never consented. (Comp., Exh. A, p. 116; Exh. F)

in an open letter to the Law School community. (Comp., Exh's. G, I)

Several weeks after the fire, Respondent Sandalow initiated correspondence with Petitioner in order to ascertain his intentions regarding re-enrollment in the Law School, and to offer an administrative hearing should he decide to re-enroll. (Sandalow letter of May 13, 1983, App., *infra*, pp. B-1 – B-2)[4] The May 13 letter stated in part that if Petitioner took and passed a polygraph examination requested by the Ann Arbor Police, he would be eligible to re-enroll at Michigan Law School; otherwise, an administrative proceeding would be necessary in order to ascertain his responsibility for the March 8th fire. Dean Sandalow received no reply.

On June 29, 1983, Respondent Sandalow again wrote Petitioner, requesting a response, and suggesting that an administrative hearing, if necessary, should be held well before the commencement of the Fall, 1983 academic term. (Sandalow letter of June 29, 1983, App., *infra*, p. C-1) Again, there was no reply.

In July, 1983, letters from Petitioner and Assistant Dean Susan Eklund apparently crossed in the mail. Eklund wrote to Petitioner on July 20 requesting a response to Dean Sandalow's May 13 and June 29 letters. (Eklund letter of July 20, 1983, App., *infra*, p. D-1) Petitioner, meanwhile, wrote to Dean Sandalow, stating that he was not prepared to declare his intentions regarding continuing his studies, and added, "since I am still encased in the equivalent of a full-body cast, I hardly think you can protest this delay." (Picozzi letter of July 18, 1983, App., *infra*, p. E-1) Dean Sandalow replied on

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[4] Because Petitioner repeatedly mischaracterizes statements made by Dean Sandalow, the correspondence is hereafter set forth in full in the Appendices.

July 29, 1983, repeating his earlier request for a prompt response so that arrangements could be made for an administrative proceeding before the Fall term; the letter was returned unclaimed. (Sandalow letter of July 29, 1983, App., *infra*, p. F-1)

The Fall semester of the 1983-1984 school year commenced. Petitioner had not requested enrollment for the Fall semester (he could not have enrolled then had he done so, because he was physically incapacitated). (Comp., ¶¶ 28, 85) Nor had he requested an administrative hearing.

Finally, in early November, 1983, Petitioner wrote Dean Sandalow and requested, not re-enrollment, but a letter reflecting his academic standing. (Picozzi letter of November 7, 1983, App., *infra*, p. G-1)

Dean Sandalow replied on November 16, 1983, sending a transcript and explaining that his understanding of Petitioner's status was that he had withdrawn from the Law School while in good academic standing, but that a question remained regarding his eligibility to re-enroll. Petitioner's eligibility to re-enroll could be determined, if he did not take and pass a polygraph examination as requested by the police, by an administrative proceeding. (Sandalow letter of November 16, 1983, App., *infra*, pp. H-1 – H-2)

On November 23, 1983, Petitioner replied, demanding that an unqualified letter of "good academic standing" be sent to the Dean of the Yale Law School. (Picozzi letter of November 23, 1983, App., *infra*, p. I-1) Dean Sandalow promptly answered, stating his willingness to write that Petitioner had withdrawn while in good academic standing, and also making clear his unwillingness to mislead the Yale Law School Dean by omitting the additional fact that there was a ques-

tion regarding Petitioner's eligibility to re-enroll at Michigan Law School. (Sandalow letter of November 29, 1983, App., *infra*, p. J-1)[5] On December 5, 1983, Petitioner replied, again demanding an unqualified letter of good standing. (Picozzi letter of December 5, 1983, App., *infra*, p. K-1) Dean Sandalow again responded, this time offering to send a specific qualified letter, a draft copy of which was enclosed. (Sandalow letter of December 13, 1983 and enclosure, App., *infra*, pp. L-1 – L-2)

Petitioner responded on December 26, 1983, indicating that he would terminate the correspondence and "pursue this matter through more influential channels with other University of Michigan officials." (Picozzi letter of December 26, 1983, App., *infra*, pp. M-1 – M-2)

Nothing in fact happened until after the end of the 1983-84 school year, when there was an exchange of letters between Petitioner's then-attorney and Dean Sandalow. (Kunstler letter of July 30, 1984, App., *infra*, pp. N-1 – N-3; Sandalow letter of August 14, 1984, App., *infra*, pp. O-1 – O-2) That concluded the correspondence.

On August 24, 1984, Petitioner sued Respondent Sandalow, University President Harold Shapiro, and the University's Board of Regents, for injunctive relief to obtain an unqualified letter of academic good standing without a prior hearing, and for compensatory and punitive damages. The gravamen of the complaint was

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[5] Petitioner maintains that issuance of the requested letter of academic good standing was a ministerial act on the Dean's part, and therefore that Petitioner had a clearly-established right to such a letter. (Petition for Certiorari, p. 17, n. 9) The record is completely devoid of evidence to support Petitioner's contention. To the contrary, Dean Sandalow's *uncontroverted* affidavit recites that there is no federal or state statute, regulation, rule or convention requiring the issuance of letters of good standing. (Affidavit of Terrence Sandalow, App., *infra*, pp. A-1 – A-6)

that the defendants violated Petitioner's due process rights, his equal protection rights, his right against self-incrimination, and various other rights, by failing to issue an unqualified letter of academic good standing as Petitioner had repeatedly requested.

On August 27, 1984, the District Court entered an order to show cause why a mandatory preliminary injunction should not be entered enjoining defendants from refusing to provide Petitioner with a letter of good standing so he could enter Yale University Law School. During the proceedings Petitioner continued to resist an administrative hearing. (See, Opinion of District Court, at Petition for Certiorari, p. A35) Finally, after urging by the Court, Petitioner entered into an agreement by which the University would conduct an administrative hearing to determine whether or not he had set the blaze. By stipulation, the University through its counsel (at that time representing all defendants) assumed the burden of establishing Petitioner's responsibility for the fire by clear and convincing evidence.

After a lengthy evidentiary hearing, the Hearing Officer concluded that the University of Michigan had not, by *clear and convincing evidence*, established Petitioner's responsibility for the fire; he added that, had the burden of proof been different, the decision may have been different.[6] (Hrg. Off. Dec., pp. 41-42) Dean Sandalow subsequently issued a letter of academic good standing.

On January 2, 1986, Chief District Judge John Feikens granted Dean Sandalow's motion for summary judgment on all counts against Sandalow in his individual capacity, and denied Petitioner's cross-motion for

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[6] Petitioner was represented at the administrative hearing, and in all proceedings below, by competent counsel.

partial summary judgment, holding that Petitioner had failed as a matter of law to show any violation of a clearly-established constitutional due process right.[7] 623 F. Supp. 1571 (January 2, 1986) (Petition for Certiorari, pp. A1-A47) The United States Court of Appeals for the Sixth Circuit affirmed the District Court's judgment for Respondent in full. 827 F.2d 770 (August 28, 1987) (Petition for Certiorari, pp. A48-A49)

REASONS FOR DENYING THE PETITION

I.

PETITIONER HAS FAILED TO PRESENT ANY REASONS FOR GRANTING CERTIORARI BY THE COURT.

The Decision below is inappropriate for review by the Court. Petitioner has failed to suggest a fundamental conflict between the Decisions below and applicable rulings of the Court. Nor is Petitioner able to identify an important undecided question of federal law warranting resolution by the Court. Indeed, Petitioner has not adduced a single special or important aspect of this case which would merit granting a writ of certiorari under the Court's Rules.

A. The Court Should Not Grant Certiorari To Decide Whether A Public University Student Has A Protected Interest In His Education, An Issue Not Even Presented By This Case.

Petitioner asserts that the instant case presents the opportunity for the Court to decide, once and for all,

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[7] The District Court also dismissed the Complaint against defendants Sandalow, Shapiro, and the Board of Regents (the latter pursuant to Petitioner's voluntary concession) in their official capacities, based on their Eleventh Amendment immunity. (Petition for Certiorari, pp. A1-A2, n. 1)

whether a university student has a protected interest in his education. (Petition for Certiorari, p. 32) Quite to the contrary, the issue is not even raised by this case. District Judge Feikens, in an opinion affirmed by the Court of Appeals, held as a matter of law that a public university student does have a protected interest in continuing his studies. (Petition for Certiorari, p. A15) Dean Sandalow did not contest that ruling (Petition for Certiorari, p. A16), and presumably neither does Petitioner. Consequently, there is no disputed issue for resolution by the Court.

B. The Issue Of Adequate Notice Under The Due Process Clause Is Not Properly Presented For Review.

Petitioner contends that, if allowed to stand, the District Court's ruling that he received constitutionally adequate notice will jeopardize the carefully nurtured ideals of all students. (Petition for Certiorari, pp. 40-43) Petitioner has raised no question of substance or magnitude concerning the lower court rulings with regard to notice.

The limited deprivation at issue was held below to be a preliminary and temporary interference with Petitioner's continued law school education, pending the outcome of an administrative hearing proposed by Respondent, and declined by Petitioner. The minimum constitutionally required notice due Petitioner was that he be "informed that the matter is pending." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In his first letter to Petitioner, Dean Sandalow stated clearly that, because of suspicions regarding his responsibility for the fire, (unless Petitioner took and passed a polygraph examination as requested by the police) his eligibility to re-enroll would have to be deter-

mined by an administrative hearing. (Sandalow letter of May 13, 1983, App., *infra*, p. B-1)

If it is supposed that any action by Respondent effected a constitutional deprivation, then Petitioner received more than constitutionally adequate apprisal of the due process measures proposed and the question to be determined, as held below. (Petition for Certiorari, pp. A32-A34)

The question of whether constitutionally adequate notice was given does not reduce, as Petitioner suggests (Petition for Certiorari, p. 39), to a formulaic recitation of required elements.[8] Rather, constitutionally adequate notice "must be of such nature as reasonably to convey the required information, ... But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied." *Mullane* v. *Central Hanover Bank & Trust Co.*, *supra*, at 314-15.

Judge Feikens' finding that there was constitutionally adequate notice rests on the "practicalities and peculiarities of the case," and implicates no principles of sufficient magnitude to warrant discretionary review.

There is, in addition, a more fundamental defect in this asserted ground for review. As held by the courts below, the question of what process was due Petitioner

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[8] Petitioner maintained below that the Dean was constitutionally bound to adhere to the administrative procedures for student discipline set forth in the University of Michigan Student Handbook, as to notice and hearing. (Petition for Certiorari, pp. 15-16, n. 8, 50-53) The lower courts, following well-established precedent, held this claim to be legally untenable. (Petition for Certiorari, pp. A31-A32) An alleged failure to comply with state procedures, were it even applicable in this case, does not, by itself, violate constitutional due process. *Board of Curators, University of Missouri* v. *Horowitz*, 435 U.S. 78, 92, n. 8 (1978). Petitioner's *ad hominem* hypothesizing as to Dean Sandalow's intentions (Petition for Certiorari, pp. 52-53) is baseless and gratuitous.

is clouded by the fact that the alleged deprivation was entirely due to *Petitioner's* physical condition, and to *his* decision to reject Respondent Sandalow's request that he state his intentions *vis-à-vis* continuing his education at Michigan Law School. (Petition for Certiorari, pp. A20-A22, A28-A29, A34-A36).

Thus, any arguable injury to Petitioner above the *de minimus* level was entirely a result of his own situation and choice, not any action by Respondent Sandalow. There is no question but that from the date of the fire until at least the Spring semester of 1984, Petitioner did not attend law school because he was physically unable to do so. (Petition for Certiorari, p. A28, n. 8) There is no question but that he did not attend law school thereafter at Ann Arbor *because he did not ask to do so.* (Petition for Certiorari, p. A28)[9] It was not Respondent Sandalow's responsibility that Petitioner attend Michigan Law School if Petitioner didn't ask to do so. And Respondent can't properly be "sandbagged" by a student who doesn't propose to return, then complains that he has not been accepted. It is obvious from the parties' correspondence, appended hereto, that had Petitioner at any time following his injury told Dean Sandalow that he wished to return to the University of Michigan Law School, an administrative proceeding would have been initiated in short order by the University.

The spurious issue of constitutionally adequate notice is therefore clouded by the fact that formal pro-

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[9] The District Court concluded as a finding of fact:

> "Unfortunately, Picozzi's medical condition prevented such an early disposition of the matter. But even after he recovered, Picozzi — not Sandalow — resisted holding a hearing. *See* Prelim. Inj. Trans. at 14-18, 27-29. Picozzi cannot now complain of the delay he occasioned." (Petition for Certiorari, pp. A35-A36)

cedures, including formal notice, were never initiated because of *Petitioner's* condition and *Petitioner's* actions. It is inconceivable that Petitioner can demonstrate a constitutional issue of sufficient magnitude to warrant review by this Court, when the sole causes of any hiatus in his education were his physical disability and his own doing. One would expect the Court's discretionary review to be reserved — if there were otherwise an issue of significant jurisprudential dimensions — for those cases where there is a significant and palpable injury to a victim without redress, and not for a case where, as here, the purported "injury" is entirely a result of the "victim's" own intransigence.

C. The Court Should Not Grant Certiorari In Order To Issue Declaratory Rules For Academic Due Process.

Petitioner's assertion that certiorari should be granted so that the Court can specify "exactly what procedures are due in what contexts" (Petition for Certiorari, p. 48) is inappropriate. The requested declaratory intervention by this Court runs fundamentally contrary to the established rule that review upon writ of certiorari is confined to cases where there are "special and important" reasons therefor. *Rice* v. *Sioux City Cemetery*, 349 U.S. 73, 74 (1954). "'Special and important reasons' imply a reach to a problem beyond the academic or episodic. This is especially true where the issues included reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion." *Id.*

Far from spawning the "disaster" that Petitioner claims (Petition for Certiorari, p. 47), the Court's opinion in *Goss* v. *Lopez*, 419 U.S. 565 (1975), ensured

the needed flexibility that academic stewardship demands:

> "All that *Goss* required was an 'informal give-and-take' between the student and the administrative body dismissing him that would, at least, give the student 'the opportunity to characterize his conduct and put it in what he deems the proper context.' *Id.*, at 584, 42 L. Ed. 2d 725, 95 S. Ct. 729. But we have frequently emphasized that '[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895, 6 L. Ed. 2d 1230, 81 S. Ct. 1743 (1961). The need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct."

Board of Curators v. *Horowitz*, *supra* at 85-86. The amount and kind of process due under *Goss* v. *Lopez* is not definitely determinable as an *a priori* matter. Rather, as Petitioner surely must know, the proper measure of minimal procedural protection is determined on a case-by-case basis, with reference to the factors announced in *Mathews* v. *Eldridge*, 424 U.S. 319, 334-35 (1976).

The courts below employed precisely such an analysis to conclude that Petitioner had received constitutionally adequate process. (Petition for Certiorari, pp. A23-A36)

II.

THE RULINGS BELOW ARE CORRECT AND SHOULD NOT BE DISTURBED.

A. The Lower Courts Properly Held That There Was No Constitutional Violation.

The courts below found that the alleged deprivation of Petitioner's entitlement to an uninterrupted public university education was extremely limited. Judge Feikens held that the severity of the alleged interruption in Petitioner's education was diminished because, "Picozzi could have promptly accepted Sandalow's offer of a hearing and cleared up his status at the Law School prior to the first date on which he was physically able to return to class." (Opinion of District Court, Petition for Certiorari, p. A28)[10] The Dean did not permanently and finally bar Petitioner's continued education; "[h]e simply placed a temporary and preliminary hurdle in Picozzi's path, *pending the outcome of an administrative hearing.*" (*Id.*, Petition for Certiorari, p. A21) (emphasis in original).

The lower courts ruled that Petitioner was not entitled to a pre-deprivation hearing, as this case falls "squarely within" the exception for cases of threatened or ongoing disruption of the academic process set forth in *Goss* v. *Lopez*, *supra*, at 582-83.[11] (Petition for Cer-

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[10] Petitioner disputes the District Court's finding of fact that it was he who caused the delay in the commencement of administrative proceedings. (Petition for Certiorari, p. 46, n. 21) The Court has repeatedly abstained from reviewing findings of fact by the court below, particularly where that finding is undisturbed by an appeals court. *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982); *United States* v. *Doe*, 465 U.S. 605, 614 (1984)

[11] The Court in *Goss* stated:

> "We agree with the District Court . . . that there are recurring situations in which prior notice and hearing cannot be

(*concluded on page 15*)

tiorari, p. A26) It cannot be disputed that Respondent Law School Dean had a substantial responsibility and interest in preventing the disruption of studies and the further imperiling of students and property by the immediate readmission of a suspected dormitory arsonist, without prior determination of his culpability.

The courts below properly held that, apart from and in addition to his compliance with *Goss* v. *Lopez*, *supra*, Respondent Sandalow accorded Petitioner the full measure of process due him. (Petition for Certiorari, pp. A27-A31) Certainly there can be no denial of due process where adequate review procedures are made available to protect against erroneous deprivation. Here, Petitioner can complain of no such deprivation, since Respondent Sandalow proposed more than adequate review procedures long before any final deprivation might take place.

Dean Sandalow had a duty to the law school community to maintain order and security following an incendiary dormitory fire. He also had a responsibility to the academic community at large. As the courts below recognized, Dean Sandalow legitimately refused to misrepresent Petitioner's academic standing to other institutions. The Dean repeatedly made clear to Petitioner that, although he would confirm that Petitioner had "withdrawn while in good academic standing," an

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(*continued from page 14*)

> insisted upon. Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable, as the District Court indicated."

419 U.S. at 582-83.

unqualified letter as requested would have suggested to the rest of academia that Petitioner had an unqualified right to return to the University of Michigan, when in fact that was not so without an administrative hearing, which the Law School was prepared to provide. (See App., *infra*, pp. A-2, B-2, C-1, F-1)

Thus, the undisputed facts, as found by the District Court and as affirmed by the Court of Appeals, were that Respondent Sandalow acted at all times to preserve safety and order in the Law School academic community, as well as to safeguard Petitioner's legitimate due process rights. Respondent promptly informed Petitioner that, if he desired to resume his studies, his eligibility to do so would depend on the outcome of due process procedures for ascertaining his culpability for the fire, which the University would initiate. Petitioner never asked to be re-enrolled at Michigan Law School. Indeed, he was physically unable to resume his studies until almost a year after the fire. Petitioner was never expelled or otherwise disciplined. His education was not significantly interrupted except by his own doing.

The courts below found that Petitioner was apprised of the salient question regarding his status at Michigan Law School, and the procedures for resolving it. The fact that such procedures were not applied until Petitioner reluctantly agreed to them at the preliminary stage of the lawsuit is, as the District Court held, entirely a consequence of his physical incapacitation and his own intransigence.

The lower courts therefore properly ruled that Petitioner had failed as a matter of law to show any violation of a clearly established constitutional due process right.

B. That Respondent Was Protected By Qualified Immunity Is An Independent And Unchallenged Basis For The Rulings Below.

The lower courts correctly held that the action against Respondent Sandalow must be dismissed in any event because Sandalow is immune from damages under the doctrine of qualified immunity announced in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). *Petitioner fails even to advert to this separate and independent ground for the rulings below in his petition for certiorari.*

Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Such qualified immunity is available to public school officials. *Wood* v. *Strickland*, 420 U.S. 308 (1975)

As the courts below properly recognized, Respondent Sandalow had no clearly established constitutional or statutory obligation to accord Petitioner a hearing prior to the preliminary action of notifying him that his continued enrollment, if he desired it, would be predicated on a factfinding concerning his connection with the fire.

Moreover, Petitioner's other claims against Dean Sandalow with respect to notice, the hearing, or other actions taken (or not taken), are similarly subject to a qualified immunity defense under *Harlow* v. *Fitzgerald*, *supra*. To prevail against such a defense, Petitioner would have to show that he had a clearly established constitutional right, and Dean Sandalow a clearly established constitutional responsibility, that he be

accorded a particular form of notice — despite the fact that Petitioner could not attend classes because of his injuries, and had not responded to repeated requests that he indicate his intentions relative to resuming his studies at Michigan.

To state the proposition is to answer it. To suggest that Petitioner had a clearly established constitutional right to a particular form of notice (commensurate with that required for expulsion of students, under the authority of *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961), and its progeny) when he was not under discipline, not able to resume his studies, and had indicated no intention to do so, is plainly absurd.[12]

CONCLUSION

For the foregoing reasons, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

By: /s/ THEODORE SACHS
Counsel of Record
ANDREW NICKELHOFF
Attorneys for Respondent Sandalow

SACHS, NUNN, KATES, KADUSHIN,
O'HARE, HELVESTON & WALDMAN, P.C.
1000 Farmer Street
Detroit, Michigan 48226 (313) 965-3464

December 28, 1987

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[12] We do not address Petitioner's unmeritorious final claim, that he was a "prevailing party" entitled to attorney's fees under 42 U.S.C. § 1988, which claim relates to the other defendants below, and not to Respondent. The other defendants are not joined in the petition for certiorari. The issue of attorney's fees is not, therefore, properly raised in the petition or before the Court.

APPENDICES TO BRIEF IN OPPOSITION

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APPENDIX A

AFFIDAVIT OF TERRANCE SANDALOW

(attached to Sandalow Motion for Summary Judgment)

AFFIDAVIT OF TERRANCE SANDALOW

STATE OF MICHIGAN
COUNTY OF WASHTENAW — ss.

TERRANCE SANDALOW, being first duly sworn, deposes and says as follows:

1. I make this affidavit on personal knowledge and I am competent to testify to the matters stated herein.

2. I am Dean of the University of Michigan Law School and have been Dean since July 1, 1978.

3. Prior to March 8, 1983, I did not know nor know of James M. Picozzi.

4. On that date I was informed that early that morning there had been a fire in the Law Quadrangle dormitory room of Mr. Picozzi and that he had suffered serious injuries. Later that month, I was informed by the responsible Ann Arbor Police Officer, Detective David Jachalke, that a comprehensive investigation conducted under his supervision by the Ann Arbor Police and Fire authorities and by University security employees had concluded that the fire was of incendiary origin and that Mr. Picozzi was the prime – indeed, the

only – suspect. Detective Jachalke detailed for me the evidence that had led the police to conclude that Mr. Picozzi had set the fire.

5. I was informed by Detective Jachalke that the Ann Arbor police had requested the Washtenaw County Prosecuting Attorney, William Delhey, to issue a criminal complaint against Mr. Picozzi but the prosecutor had declined to do so. Detective Jachalke informed me, however, that Prosecutor Delhey had advised him that although he did not feel at that time that a prosecution would be warranted, Detective Jachalke should request Mr. Picozzi to submit to a polygraph examination upon the completion of his medical problems. I was further informed by Detective Jachalke that the police file remained inactive with Mr. Picozzi remaining the only suspect.

6. I did not at any time accuse Mr. Picozzi of responsibility for the March 8 fire. I did, however, inform him by a series of letters that his eligibility for reenrollment depended upon an administrative hearing which would examine whether he was the person responsible for setting the fire. I also corresponded with Mr. Picozzi and later with his counsel concerning his request, first made in November, 1983, for an unqualified letter of academic good standing, which he asked me to send to the Dean of the Yale Law School. True copies of the correspondence between Mr. Picozzi and myself and between his counsel and myself are appended to his Complaint. In addition, true copies of a letter from Mr. Picozzi to me dated July 18, 1983, from me to Mr. Picozzi dated July 29, 1983 (returned unclaimed), and from Mr. Pocozzi [*sic*] to me dated December 5, 1983, are appended to this affidavit. My letters to Mr. Picozzi and his counsel accurately set forth my reasons for the actions taken by me.

7. To my knowledge and belief, there was and is no federal or state statute, regulation or rule applicable to the issuance of letters of good standing. Although such letters may be given when there is no issue as to good standing, there is no convention requiring the issuance of such letters if there is a question about the student's eligibility for enrollment or re-enrollment. In my opinion, an unqualified letter of academic good standing would be understood to connote that the institution issuing the letter would unqualifiedly accept the student for continued enrollment or re-enrollment. Prior to the 1985 Hearing Officer's Decision I regarded the requested unqualified letter of good standing, and believe others in academia would have regarded such letter, as misleading and a misrepresentation, since, though technically accurate, it would have inaccurately signified that the University of Michigan Law School would have accepted Mr. Picozzi for re-enrollment without his satisfying the due process administrative hearing which I had repeatedly offered to him.

8. The "disenrollment" of Mr. Picozzi in April 1983 by Assistant Dean Susan M. Eklund had nothing whatsoever to do with the actions which I took on behalf of the Law School relative to Mr. Picozzi's possible re-enrollment, to any administrative hearing thereon, or to the requested letter of academic good standing — as I repeatedly made clear to Mr. Picozzi when he inquired as to his status.

9. Immediately following the Decision of Hearing Officer Robert E. Guenzel, dated August 22, 1985, following the administrative hearing to which Mr. Picozzi had finally acceded following the initiation of this suit, I issued the requested letter of good standing to him

(through his counsel). I did so pursuant to what I understood to be the agreement of counsel for the University and of Mr. Picozzi, despite the hearing officer's conclusion that although the University had not sustained its assumed burden of proof by clear and convincing evidence, "If the burden of proof had been different, the decision may [have] been different." Hearing Officer's Decision, p. 41.

10. On information and belief, Mr. Picozzi has enrolled in Yale Law School for the current, 1985-86 academic year.

Further deponent sayeth not.

/s/ TERRANCE SANDALOW

(Jurat Omitted)

APPENDIX B

SANDALOW LETTER OF MAY 13, 1983

(Complaint, Exhibit N)

Mr. James M. Picozzi
616 Sewickley Heights Drive
Sewickley Heights Manor Drive Condo
Sewickley Heights, Pennsylvania 15143

May 13, 1983

Dear Mr. Picozzi:

I was pleased to learn from Professor Barker that your recovery is progressing well.

As you know, no criminal charges have as yet been filed in connection with the fire that was set in your room in the early morning hours on March 8. Whether or not such charges are ever filed, the Law School and the University have an independent interest in determining the identity of the person responsible, especially because the continuing presence of that individual within the community would create a serious risk to its members.

In this connection, I have been informed that the Ann Arbor police have requested that you take a polygraph test and that your father has indicated that you would be willing to do so. I am writing to notify you that if you do take a polygraph test administered or arranged by the Ann Arbor police and if that test indicates that you are not responsible for the March 8 fire, you would of course be permitted to return to the Law School in the fall term.

With regret, I must also inform you that unless you take a polygraph test, an administrative proceeding will be required to determine whether you will be permitted to re-enroll as a student. The information available to us has led me to conclude that I would not be warranted in permitting you to re-enroll without a close examination of the question whether you are the person responsible for setting the March 8 fire.

The necessity for such a proceeding would, of course, be obviated if you were to take and pass a polygraph test, and I of course hope that you will pursue that course. I would appreciate it if you would notify me of your plans within the next several weeks.

Sincerely,
/s/ Terrance Sandalow
Dean

APPENDIX C

SANDALOW LETTER OF JUNE 29, 1983

(Complaint, Exhibit O)

Mr. James M. Picozzi
616 Sewickley Heights Drive
Sewickley Heights Manor Drive Condo
Sewickley Heights, Pennsylvania 15143

June 29, 1983

Dear Mr. Picozzi:

On May 13 I wrote inquiring whether you planned to take a polygraph test administered by the Ann Arbor Police Department and notifying you that unless you took and passed such a test, it would be necessary for me to arrange for an administrative hearing to determine your eligibility to continue in School. I have not yet heard from you regarding your plans and would appreciate it if you would write or call me within the next little while. If such a proceeding is necessary, I think it is important — in your interest as well as that of the Law School — that it be held well before August 29, when the Fall Term begins. Since only eight weeks remain in the summer, it will be necessary to begin making arrangements fairly promptly if a proceeding is required.

Sincerely,
/s/ Terrance Sandalow
Dean

APPENDIX D

EKLUND LETTER OF JULY 20, 1983

(Exhibit to Susan Eklund Affidavits, attached to Sandalow Motion for Summary Judgment)

Mr. James M. Picozzi
616 Sewickley Heights Drive
Sewickley Heights Manor Drive Condo
Sewickley Heights, PA 15143

July 20, 1983

Dear Mr. Picozzi:

Dean Sandalow has advised me that you have not yet responded to his letters of May 13th and June 29th regarding your return to school. I understand that, although you have not formally contracted a room in the Lawyers Club, Diane Nafranowicz has graciously refrained from entering into a lease with another student for the room in which you had expressed interest. Space in the Club is in high demand and I will advise Ms. Nafranowicz that she may lease this room to another if we have not received a response from you by July 27, 1983.

Sincerely yours,
/s/ Susan M. Eklund
Assistant Dean

cc: Dean Sandalow
Diane Nafranowicz

APPENDIX E

PICOZZI LETTER OF JULY 18, 1983

(Exhibit to Terrance Sandalow Affidavit)

87 St. Stephen's Ln. West
Scotia, NY 12302
July 18, 1983

Mr. Terrance Sandalow
Hutchins Hall
The University of Michigan Law School
Ann Arbor, MI 48109

Dear Sir:

Let this document serve to acknowledge your letters of May 13 and June 29. While I agree that it is in the interest of all parties involved to resolve our conflict as soon as possible, I am not yet prepared to give a full response to your ultimatum. When I am, I will contact you again. Since neither you nor any Law School official bothered to visit me in the almost full month I was a patient at the University of Michigan Hospital, since it was more than two months after my injuries were sustained before you personally contacted me at all, and since I am still encased in the equivalent of a full-body cast, I hardly think you can protest this delay.

Until you hear from me again, let me admonish you against doing anything either to disparage my good name or to place duress upon my family or me. I will tolerate no further lies by University of Michigan officials.

Sincerely,
/s/ James M. Picozzi

APPENDIX F

SANDALOW LETTER OF JULY 29, 1983

(Exhibit to Terrance Sandalow Affidavit)

Mr. James M. Picozzi
87 St. Stephen's Lane West
Scotia, New York 12302

July 29, 1983

Dear Mr. Picozzi:

I am writing in response to your somewhat puzzling letter of July 18. I am not aware that there is any "conflict" between us to be resolved, nor have I issued any ultimatum to which you have been asked to respond. Neither am I aware of any lies by University of Michigan officials.

I have written that because of information we have received from the Ann Arbor police it will be necessary for us to conduct an administrative hearing to determine your eligibility to re-enroll at the Law School unless you take and pass a polygraph test administered or arranged by the Ann Arbor police. Since such a proceeding will take time to arrange, it will be necessary for me to have notice of your intentions well in advance of the beginning of the Fall Term if you wish to re-enroll at the Law School during that term. And since the opening of the Fall Term is now only one month away, it will be necessary for me to hear from you rather promptly. Of course, if you do not wish to re-enroll in the Fall Term, there is no need for your prompt response.

Sincerely,
Terrance Sandalow
Dean

bcc: Susan M. Eklund

APPENDIX G

PICOZZI LETTER OF NOVEMBER 7, 1983

(Complaint, Exhibit P)

2221 Poor Richard's Lane
Pittsburgh, PA 15237
November 7, 1983

Mr. Terrance Sandalow
Office of the Dean
Hutchins Hall
The University of Michigan Law School
Ann Arbor, MI 48109

Dear Mr. Sandalow:

I formally request a letter stating what, according to you, my academic standing is at the University of Michigan. In addition, I would like a copy of my complete transcript.

Please reply promptly, as several parties await your answer.

Sincerely,
/s/ James M. Picozzi

APPENDIX H

SANDALOW LETTER OF NOVEMBER 16, 1983

(Complaint, Exhibit Q)

Mr. James M. Picozzi
2221 Poor Richard's Lane
Pittsburgh, Pennsylvania 15237

November 16, 1983

Dear Mr. Picozzi:

I am writing in response to your letter of November 7 requesting a statement regarding your academic standing and a copy of your transcript. A copy of your transcript is enclosed.

My understanding is that you are currently on a leave of absence from the Law School, having withdrawn while in good academic standing. A question remains regarding your eligibility to re-enroll. As I wrote on May 13, 1983 and again on June 29, 1983, information that we have received from the police has raised a question regarding your responsibility for the fire in your room on March 8. My hope, as I have previously written, is that the question of your responsibility might be resolved by your taking a polygraph examination as requested by the Ann Arbor Police. Were you to take and pass such an examination, under the circumstances stated in my earlier letters, you would of course be eligible to re-enroll at the Law School. If, however, you decide against taking the examination or if you fail to pass it, a hearing would be necessary to determine your eligibility to re-enroll.

If you decide that you do wish to re-enroll at the Law School, I would appreciate it if you would notify me at least four to six weeks prior to the beginning of the term so that a decision regarding your eligibility can be made prior to the beginning of the term.

Sincerely,
/s/ Terrance Sandalow
Dean

Enc.

APPENDIX I

PICOZZI LETTER OF NOVEMBER 23, 1983

(Complaint, Exhibit R)

2221 Poor Richard's Lane
Pittsburgh, PA 15237
November 23, 1983

Mr. Terrance Sandalow
Office of the Dean
Hutchins Hall
The University of Michigan Law School
Ann Arbor, MI 48109

Dear Mr. Sandalow:

In your letter of November 16, you stated that, according to you, I am currently on a leave of absence from the University of Michigan Law School, having withdrawn while in good academic standing. I would like you to reiterate that statment of my good academic standing and send it in a letter to Dean James A. Thomas at the following address:

Yale Law School
Box 401A Yale Station
New Haven, CT 06520

Let me admonish you, sir, against editorializing. Any statement you make that in any way calls my character into question I will make you defend in a court of law.

I appreciated your prompt action on my last request and trust you will be just as prompt in this matter.

Sincerely,
/s/ James M. Picozzi

APPENDIX J

SANDALOW LETTER OF NOVEMBER 29, 1983

(Complaint, Exhibit S)

Mr. James M. Picozzi
2221 Poor Richard's Lane
Pittsburgh, Pennsylvania 15237

November 29, 1983

Dear Mr. Picozzi:

I am writing in response to your letter of November 23 requesting that I write Dean James Thomas at Yale that you are currently on a leave of absence from the University of Michigan Law School, having withdrawn while in good academic standing. I would be happy to write Dean Thomas to that effect, but believe that it would be misleading for me to do so without a further statement indicating that there is a question regarding your eligibility to re-enroll at the Law School. Since I am not certain whether you would wish me to write such a letter, I shall defer writing to Dean Thomas until I hear from you.

Sincerely,
/s/ Terrance Sandalow
Dean

APPENDIX K

PICOZZI LETTER OF DECEMBER 5, 1983

(Exhibit to Terrance Sandalow Affidavit)

Mr. Terrance Sandalow
Office of the Dean
Hutchins Hall
The University of Michigan Law School
Ann Arbor, MI 48109

Dear Sir:

I formally request, again, that you write to Dean James Thomas at the Yale Law School verifying my academic good standing. If your statement — that I am currently on a leave of absence from the University of Michigan, having withdrawn while in good academic standing — is true, then I fail to understand how it can be misleading.

Any elaboration beyond that point concerning my current situation remains solely your decision. I do not give you license to libel me. I repeat, any statement you make which in any way calls my character into question I will make you defend in a court of law. If you can prove what you say is true, and that you say it without malice, then you have nothing to fear.

To be perfectly frank, sir, I have never understood either the adversary situation you have created between us or what you hope to gain by it. Right now, I am attempting to give you a gentleman's way out. I sincerely hope you take it. The alternative, for both parties, would be much more painful — but, I believe, more damaging for you. If nothing else, I would think I have proven, in more ways than one, that I do not die easily.

Sincerely,
/s/ James M. Picozzi

APPENDIX L

SANDALOW LETTER OF DECEMBER 13, 1983 and enclosure *(Complaint, Exhibit T)*

Mr. James M. Picozzi
2221 Poor Richard's Lane
Pittsburgh, Pennsylvania 15237

December 13, 1983

Dear Mr. Picozzi:

A letter that merely states you are on a leave of absence from the Law School, having withdrawn while in good academic standing, while true, would be misleading in failing to disclose to Dean Thomas all that is relevant to an understanding of your status at the University of Michigan. I am unwilling to write such a letter.

I am enclosing a draft letter that I am prepared to send to Dean James Thomas, but only if you authorize me to do so. Although every fact stated in the draft letter is true, I am unwilling to send it without your express authorization. The mere fact that I might prevail in the defamation action that you threaten is not, in my view, a sufficient reason to expose either me or the University to a law suit. The defense of any such action, however frivolous the action might be, would be very costly both in my time and in the expense to the University.

To summarize, I am willing to write Dean Thomas only if I am able to include all of the information that I regard as relevant to an understanding of your status at the School and to do so only if I have your authorization to send such a letter.

Sincerely,
/s/ Terrance Sandalow
Dean

Enclosure

[*ENCLOSED DRAFT LETTER*]

Dean James A. Thomas
Yale Law School
New Haven, Connecticut 06520

Dear Jim:

James M. Picozzi has asked that I write you regarding his status at the University of Michigan Law School.

As you may know, Mr. Picozzi was injured as a result of a fire that occurred in his dormitory room during the night of March 8. Because of his injuries, he withdrew from School and has been on a leave of absence ever since. At the time of his injury, he was in good academic standing, and he remains so at the present time.

An investigation of the fire led the police to conclude that the fire was deliberately set. Although no charges have been filed, I have been informed by the police that they regard Mr. Picozzi as a suspect and that he has been asked by them to take a polygraph test.

I have informed Mr. Picozzi that if he takes and passes a polygraph test, he will be permitted to re-enroll at the Law School. I have also informed him, however, that if he decides not to take a polygraph test, or if he fails to pass one, it will be necessary for us to conduct a hearing to determine his eligibility to re-enroll.

In reporting these facts to you, I do not wish to assert, nor even to suggest, that Mr. Picozzi did set the fire in his room last March. I do not currently have sufficient information to warrant a judgment regarding the question of his responsibility.

I hope this information will be of assistance to you.

Sincerely,
TS

APPENDIX M

PICOZZI LETTER OF DECEMBER 26, 1983

(Complaint, Exhibit U)

2221 Poor Richard's Lane
Pittsburgh, PA 15237
December 26, 1983

Mr. Terrance Sandalow
Office of the Dean
Hutchins Hall
The University of Michigan Law School
Ann Arbor, MI 48109

Dear Terry:

I totally reject your proposed letter, dated December 13, to Dean Thomas. First, every statement in the letter is not true. Second, it unfairly calls my character into question, something I have warned you about repeatedly.

Indeed, sir, you have argued that you will not write a misleading letter, yet your proposed letter could hardly be more so. It gives the impression that the police have accused me of arson, which they have not. Conversely, it suggests that you do not accuse me of arson, which you most certainly do. Indeed, you are the only person who accuses me of arson.

I also am not deceived, sir, by the casual manner in which you dismiss a defamation action by me. I do not consider to be "frivolous" any such action against one who accuses me of a felony. Furthermore, I have no doubt that I would prevail in any one of a number of actions against you. Indeed, the facts that you attempt to keep me under your thumb and that you refuse to

send a supposedly "true" statement to Yale without my authorization indicate that — despite your bravado — you, too, respect my ability to prevail in a lawsuit.

However, sir, you clearly have no intention of dealing honestly with me. I, therefore, terminate our correspondence for now. After January 1, I will pursue this matter through more influential channels with other University of Michigan officials.

Sincerely,
/s/ James M. Picozzi

APPENDIX N

KUNSTLER LETTER OF JULY 30, 1984

(Complaint, Exhibit V)

Dean Terrance Sandalow
University of Michigan School of Law
Hutchins Hall
Ann Arbor, MI 48109

July 30, 1984

Re: James M. Picozzi

Dear Dean Sandalow,

I am writing to request that the University of Michigan Law School grant Mr. James M. Picozzi a letter of good standing, so that he may apply for admission to other law schools.

As you know, Mr. Picozzi was the victim of repeated harassment during the almost two years he spent at the University of Michigan. This harassment ranged from the infantile, *e.g.*, placement of derogatory posters about Mr. Picozzi throughout the law school; to the cruel, *e.g.*, making fun of his physical handicap; to the criminal, *e.g.*, filing a false report that Mr. Picozzi had a firearm in his possession, causing a search to be conducted of his room. Mr. Picozzi was hectored in the classroom, pushed around in the library, and harassed while in his own room. Despite numerous complaints to your office, no action was ever taken against those individuals responsible. This harassment was so obvious that Professor Yale Kamisar felt compelled to personally intervene on behalf of Mr. Picozzi, chastising one of his principal tormentors.

The fire of March 8, 1983, occurred against this background of constant hazing and official non-action. As

you also must know, Mr. Picozzi was seriously injured in the fire.

It was characteristic of Mr. Picozzi's stay at the University of Michigan that the police investigation focused solely on the possibility that Mr. Picozzi himself may have set the fire. A police investigation was conducted, and Mr. Picozzi cooperated fully. Whatever "suspicions" the police may have entertained, no prosecutorial action was ever taken against Mr. Picozzi. There was no prosecutor's information filed, nor was the case ever referred to a grand jury. There was no determination that probable cause existed to charge Mr. Picozzi with arson, and no warrant for his arrest was ever issued. The case was placed on the inactive list.

After reviewing your correspondence with Mr. Picozzi, I am unable to understand why the requested letter has not yet issued. I have reviewed your draft letter of December 13, 1983, and agree with Mr. Picozzi that it is unacceptable. First, your demand that Mr. Picozzi submit to a polygraph examination as a condition precedent to his re-enrollment is not justified by any University of Michigan rule or regulation, and is undoubtedly unconstitutional. To force Mr. Picozzi to submit to a procedure which every court in this nation has found unreliable, forcing him to prove that he did not commit a criminal act, is inconsistent with the most basic notions of due process. You cannot legally condition Mr. Picozzi's re-enrollment upon his submission to such a procedure, and in any event, there is no reason to inform other universities about what you might try to do should Mr. Picozzi attempt to re-enroll. Second, your statement, "I do not wish to assert, nor even to suggest, that Mr. Picozzi did set the fire in his room last March" is a rather disingenuous use of a

negative pregnant. Since you "do not currently have sufficient information to warrant a judgment," I would request that you omit references to that which you do not know, and avoid implying that which you state you are not trying to suggest. Lastly, your recitation of police "suspicions" about Mr. Picozzi is unwarranted. Mr. Picozzi is legally innocent of any wrongdoing and it is illegal and unconscionable for him to suffer civil disabilities because certain police officers do not share the views of the District Attorney.

I request that you draft a letter of good standing for Mr. Picozzi, *sans* rumor, hearsay, speculation, and innuendo, and submit it at your earliest convenience to this office.

Mr. Picozzi has suffered physically and mentally during the past year. He desires to resume his legal studies and commence what promises to be a brilliant career in law. I trust that you will put aside your own suspicions and grant Mr. Picozzi the chance he never had at the University of Michigan.

Because the time limit for transfer admissions to Yale University is rapidly approaching, I request your response no later than August 10, 1984.

Cordially yours,
/s/ William M. Kunstler
Attorney for James Picozzi

cc. Mr. James M. Picozzi
Mr. Roderick Daane, General Counsel
University of Michigan
Mr. Harold Shapiro, President,
University of Michigan

APPENDIX O

SANDALOW LETTER OF AUGUST 14, 1984

(Complaint, Exhibit Z-1)

William M. Kunstler, Esq.
Kunstler & Mason
13 Gay Street
New York, New York 10014

August 14, 1984

Dear Mr. Kunstler:

I am writing in response to your letter of July 30 requesting that I "grant Mr. James M. Picozzi a letter of good standing, so that he may apply for admission to other law schools."

I shall withhold detailed comment upon the various assertions in your letter, but I should say that some are inaccurate and that I have no information regarding others.

There is, however, one inaccuracy that should not be allowed to pass without correction. Contrary to your statement, I have not demanded that Mr. Picozzi submit to a polygraph examination as a condition precedent to his re-enrollment at the Law School. My letter of May 13, 1983, which I assume Mr. Picozzi has given to you, merely notes my understanding that the Ann Arbor police requested him to take such an examination. It went on to inform him that if he did not do so, an administrative proceeding would be required to determine whether he would be permitted to re-enroll as a student.

The need for such a proceeding arises because information we have received from the Ann Arbor police raises a serious question about Mr. Picozzi's responsi-

bility for the fire set in his room on the night of March 8, 1983. The failure of the local prosecutor to file a criminal charge does not, of course, obviate the need for a proceeding within the University. Picozzi's potential criminal responsibility and his eligibility to re-enroll as a student involve different questions and are governed by different procedures and standards of proof.

In these circumstances, I do not believe that I can in good conscience furnish the letter that you and Mr. Picozzi have requested. As I wrote Picozzi on November 29, a letter stating unqualifiedly that he is currently in good standing at Michigan, though technically accurate, would be seriously misleading in failing to reveal that there is a question about his eligibility to re-enroll. As a lawyer, you will surely appreciate the ethical considerations that require me to refuse to furnish such a letter.

I reqret that my absence from the country prevented as prompt a reply as you had requested.

Sincerely,
/s/ Terrance Sandalow
Dean